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Supreme Court of the United States

OCTOBER TERM, 1950

No. 355

COBBIN D. HUGHES, ADMINISTRATOR OF THE ESTATE OF HAROLD G. HUGHES, APPELLANT,

vs.

GLENN C. FETTER AND FARMERS MUTUAL AUTOMOBILE INSURANCE COMPANY

APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN

FILED OCTOBER 12, 1950.

SUPREME COURT OF THE UNITED STATES

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APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN

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[fol. 1] [File endorsement omitted]

IN SUPREME COURT OF WISCONSIN, AUGUST TERM, 1949

No. 187

CORBIN D. HUGHES, Administrator of the Estate of Harold G. Hughes, Plaintiff and Appellant,

vs.

GLENN C. FETTER and FARMERS MUTUAL AUTOMOBILE INSURANCE COMPANY, a Wisconsin Corporation, Defendants and Respondents

PETITION FOR ALLOWANCE OF APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN TO THE SUPREME COURT OF THE UNITED STATES—Filed September 1, 1950

To the Chief Justice of the Supreme Court of the State of Wisconsin:

Corbin D. Hughes, Administrator of the Estate of Harold G. Hughes, respectfully shows:

1. Petitioner is the plaintiff-appellant in the above entitled cause.

2. Plaintiff-appellant, Corbin D. Hughes, filed a complaint in the Circuit Court of Milwaukee County, State of Wisconsin, for a cause of action for wrongful death, based on the Illinois Wrongful Death Statute, Sections 1 and 2 of Chapter 70 of Smith and Hurd Illinois Annotated Statutes. Summary judgment was entered by the trial court dismissing the plaintiff's complaint on the merits.

3. On appeal from said judgment to the Supreme Court of the State of Wisconsin the decision of the trial court was affirmed by said Supreme Court on the 8th day of May, 1950, by written decision, and thereafter your petitioner applied for rehearing, which was denied by said court on the 30th day of June, 1950.

[fols. 2-3] 4. In said cause there is drawn in question the validity of Section 331.03 of the Revised Statutes of the State of Wisconsin, on the ground of its being repugnant

to Section 1 of Article IV and Section 1 of the Fourteenth Amendment of the United States Constitution. The decision of the Supreme Court of the State of Wisconsin is in favor of its validity.

5. The plaintiff-appellant, Corbin D. Hughes, as the Administrator of the Estate of Harold G. Hughes, considers himself aggrieved by the judgment of the Supreme Court of Wisconsin entered on the 30th day of June, 1950.

Wherefore, petitioner prays for an order allowing an appeal from the Supreme Court of the State of Wisconsin to the Supreme Court of the United States in order that the decision of the Supreme Court of the State of Wisconsin may be examined; that citation be issued in accordance with law; that an order be made with respect to the appeal bond to be given by said plaintiff-appellant; that the material parts of the record, proceedings and papers upon which said final judgment and decree were based, duly authenticated, be sent to the Supreme Court of the United States in accordance with the rules in such case made and provided.

The errors upon which your petitioner claims to be entitled to an appeal are those above indicated and more fully set out in the assignment of errors filed herewith.

Dated at Milwaukee, Wisconsin, this 29th day of August, 1950.

Samuel Goldenberg, Counsel for Petitioner.

[fol. 4] [File endorsement omitted]

IN SUPREME COURT OF WISCONSIN

[Title omitted]

ORDER ALLOWING APPEAL—Filed September 1, 1950

The petition of Corbin D. Hughes, Administrator of the Estate of Harold G. Hughes, for an appeal in the above cause to the Supreme Court of the United States from the Supreme Court of the State of Wisconsin, and the assignment of errors filed therewith, and the record of said cause having been considered,

It Is Ordered that an appeal be and hereby is allowed to the Supreme Court of the United States from the Supreme Court of Wisconsin, as prayed in said petition, and the Clerk of the Supreme Court of the State of Wisconsin is directed to prepare and certify a transcript of the record and proceedings in the above cause and transmit the same to the Supreme Court of the United States within twenty (20) days from date hereof.

It Is Further Ordered that the said Corbin D. Hughes, as Administrator of the Estate of Harold G. Hughes, shall give good and sufficient security in the sum of two hundred and fifty dollars ($250.00); that said plaintiff-appellant shall prosecute said appeal to effect, and that if said plain-
[fols. 5-8] tiff-appellant fails to make his plea good he shall answer all costs.

The said plaintiff-appellant now presenting a bond in the sum of two hundred and fifty dollars ($250.00), with Continental Casualty Company as surety,

It Is Ordered that the same be and it is hereby approved.

The appeal shall operate as a supersedeas.

Dated at Madison, Wisconsin, this 29th day of August, 1950.

Oscar M. Fritz, Chief Justice of the Supreme Court of the State of Wisconsin. (Seal.)

[fol. 9] [File endorsement omitted]

IN SUPREME COURT OF WISCONSIN

[Title omitted]

ASSIGNMENT OF ERRORS AND PRAYER FOR REVERSAL—Filed September 1, 1950

Corbin D. Hughes, Administrator of the Estate of Harold G. Hughes, plaintiff-appellant in the above entitled cause, in connection with his appeal to the Supreme Court of the United States, hereby files the following assignment of errors upon which he will rely in his prosecution of said appeal from the final judgment of the Supreme Court of Wisconsin dated the 30th day of June, 1950.

The Supreme Court of Wisconsin erred:

In holding that Section 331.03, Wisconsin Statutes (as construed by the Supreme Court of Wisconsin in its opinion

under date of May 2, 1950), did not violate the Full Faith and Credit Clause (Section 1, Article IV, U. S. Constitution) and the Due Process Clause (Section 1, Fourteenth Amendment, U. S. Constitution).

Wherefore, plaintiff-appellant prays that the final decree of the Supreme Court of Wisconsin be reversed, and for such other relief as the Court may deem fit and proper.

Samuel Goldenberg, Counsel for Plaintiff-Appellant.

[fols. 10-52] [File endorsement omitted]

[fols. 53-60] [Caption omitted]

[fol. 61] [File endorsement omitted]

IN CIRCUIT COURT OF MILWAUKEE COUNTY

CORBIN D. HUGHES, Administrator of the Estate of Harold G. Hughes, Plaintiff,

vs.

GLENN C. FETTER and FARMERS MUTUAL AUTOMOBILE INSURANCE COMPANY, a Wisconsin Corporation, Defendants

COMPLAINT—Filed July 24, 1948

First Cause of Action

Now comes the plaintiff, Corbin D. Hughes, Administrator of the Estate of Harold G. Hughes, by Backus & Parson, his attorneys, and complains of the defendants and alleges as follows:

1. Plaintiff was appointed administrator of the Estate of Harold G. Hughes by the County Court of Milwaukee County on the 24th day of May, 1948. Said Corbin D. Hughes resides at 3135 North 53rd Street, Milwaukee 10, Wisconsin, and is a sales engineer by occupation.

2. Defendant Glenn C. Fetter resides at 2367 North 38th Street, City and County of Milwaukee, State of Wisconsin. At the times hereinafter mentioned he was in the United States Army, being stationed at Fort Knox, Kentucky.

3. The defendant, Farmers Mutual Automobile Insurance Company is a Wisconsin corporation and maintains an office at 231 West Wisconsin Avenue in the City and County of Milwaukee, State of Wisconsin, and is engaged in business as an insurance corporation issuing to its assured policies of casualty insurance insuring its assured as the [fol. 62] owners and operators of automobiles against loss and damage for personal injury and against loss and damage for property damage occasioned by the ownership, maintenance and operation of such insured's automobiles on the highways within the United States, and duly authorized to issue the policy of casualty insurance hereinafter mentioned and involved in this case.

• • • • • • •

5. Illinois Highway 40 is a highway running in a generally east and west direction through the State of Illinois and runs east and west through the Village of Montrose, Effingham County, State of Illinois. The Dietrich-Montrose Road is a macadam highway running generally north and south in the County of Effingham, State of Illinois, and runs through the Village of Montrose, at which village it intersects with Illinois Highway 40.

6. Plaintiff alleges upon information and belief that on January 9, 1948 at about seven-thirty o'clock p. m. the defendant Glenn C. Fetter was driving the Studebaker [fol. 63] Sedan aforementioned in a generally northerly direction on said Dietrich-Montrose Road; said Harold G. Hughes, now deceased, was riding in said automobile as a passenger for hire at said time; said defendant Glenn C. Fetter was negligently operating his said automobile at an excessive rate of speed and drove through a stop sign at the intersection of said Dietrich-Montrose Road and Highway 40 in the Village of Montrose and collided with a truck being driven West on said highway 40, turning over the truck as a result of said collision.

• • • • • • •

8. Plaintiff alleges on information and belief that said deceased exercised due care and caution for his own safety at the time of said collision and prior thereto.

[fols. 64-65] 9. As a result of the negligence of the defendant, Glenn C. Fetter aforesaid, Harold G. Hughes, deceased,

sustained personal injuries consisting of a fractured skull and internal injuries, resulting in his death on January 11, 1948 at the City of Effingham, County of Effingham, State of Illinois, leaving him surviving his father, Corbin Hughes, a step-mother, Dorothy Hughes, both of Milwaukee, and a brother, Dale Hughes of Rock Island, Illinois.

10. By reason of the death of said Harold G. Hughes, caused and occasioned as aforesaid, the said Corbin D. Hughes has lost the society and companionship of his said son, aged 18, and has been deprived of his future aid and assistance, and has otherwise sustained a pecuniary loss of $15,000.

Wherefore, Plaintiff, Corbin D. Hughes, as Administrator of the Estate of Harold G. Hughes, deceased, demands judgment against the defendants in the sum of Fifteen Thousand ($15,000.00) Dollars, together with the costs and disbursements of this action.

* * * * * * *

[fol. 66] Backus & Parson, Attorneys for Plaintiff.

Duly sworn to by Corbin D. Hughes. Jurat omitted in printing.

[fol. 67] [File endorsement omitted]

IN CIRCUIT COURT OF MILWAUKEE COUNTY

[Title omitted]

ANSWER OF DEFENDANT, GLENN C. FETTER—Filed October 7, 1948

Now comes the defendant, Glenn C. Fetter, by Hannan, Johnson & Goldschmidt, his attorneys, and answering the complaint of the plaintiff herein, admits, denies and alleges as follows:

1. Admits, in answer to paragraph 4, that prior to the 9th day of January, 1948, the defendant, Farmers' Mutual Automobile Insurance Company, issued and delivered to one Leo Fetter, father of this answering defendant, its policy of automobile liability insurance, which said policy of insur-

ance was in full force and effect on said last mentioned date, subject, however, to all of the terms, limitations, conditions and exclusions therein contained.

2. Admits that on said 9th day of January, 1948, at about 7:20 o'clock in the evening of said day, this answering defendant was operating a Studebaker automobile owned by the said Leo Fetter, which said automobile was being operated in a northerly direction on and along the Dietrich-Montrose Road, near the Village of Montrose, Effingham County, Illinois; admits that at said time and place Harold G. Hughes was a passenger in said automobile; denies that the said Harold G. Hughes was a passenger for hire at said time; admits that a collision occurred between the automobile driven by this answering defendant and an automobile truck which was being operated in a westerly direction on and along Highway 40.

3. Denies that this answering defendant was careless, negligent or guilty of failure to exercise ordinary care in any of the manners set forth in paragraphs 6 and 7 of [fol. 68] said complaint, or in any other manner.

4. Denies that the said Harold G. Hughes exercised due care and caution for his own safety at the time of said collision and immediately prior thereto.

5. Denies that he has any knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 9 and 10 of said complaint with respect to the injuries and damages alleged to have been sustained by the plaintiff herein and the said Harold G. Hughes and, because of the lack of such knowledge and information, denies said allegations and puts plaintiff to his proof with respect thereto.

And as and for his answer to the second alleged cause of action, this answering defendant admits, denies and alleges as follows:

1. Reiterates with the same force and effect as if fully set forth herein, his answers to paragraphs 1 to 5, inclusive, and paragraphs 8 to 10, inclusive, of the first alleged cause of action.

2. Admits that on the 9th day of January, 1948, at about 7:20 o'clock in the evening of said day, this answering defendant was driving the Studebaker Sedan owned by the said Leo Fetter, which said automobile was being operated

in a northerly direction on and along said Dietrich-Montrose Road; admits that at said time the said Harold G. Hughes was a passenger in said automobile; admits that a collision occurred between the Studebaker automobile driven by this answering defendant and an automobile truck, which truck was being driven in a westerly direction on and along Highway 40.

3. Denies that this answering defendant, with conscious indifference to surrounding circumstances and conditions, was guilty of willful and wanton negligence in any of the manners alleged in paragraph 3 of said second cause of action, or in any other manner.

4. Denies that he has knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 4 with respect to the injuries and damages alleged to have been sustained by the plaintiff and by the said Harold G. Hughes, and because of the lack of such knowledge and information, denies said allegations and puts plaintiff to his proof with respect thereto.

[fols. 69-72] Wherefore, this answering defendant demands judgment dismissing the complaint of the plaintiff herein, together with costs and disbursements.

Hannan, Johnson & Goldschmidt, Attorneys for Defendant, Glenn C. Fetter.

Duly sworn to by W. J. Goldschmidt. Jurat omitted in printing.

Service admitted Sept. 29, 1948. Backus & Parson, Plaintiff's attorneys.

[fol. 73] [File endorsement omitted]

IN CIRCUIT COURT OF MILWAUKEE COUNTY

[Title omitted]

NOTICE TO ADMIT OR DENY—Filed May 13, 1949

To: Hannan, Johnson & Goldschmidt, Attorneys for Defendants, Glenn C. Fetter and Farmers Mutual Automobile Insurance Company.

Please Take Notice that the plaintiff in the above entitled action, pursuant to Sec. 327.22 Wisconsin Statutes, hereby demands that you admit or refuse to admit in writing, within

five days, the specific facts hereinafter set out. In case of your refusal to so admit, the plaintiff will ask the Court to tax as costs against the defendants the reasonable expenses of proving the same.

1. That Harold G. Hughes died on January 11, 1948 at the City of Effingham, County of Effingham, State of Illinois.

2. That Harold G. Hughes sustained personal injuries consisting of a fractured skull and internal injuries in said collision on January 9, 1948.

3. That Harold G. Hughes died from injuries sustained on January 9, 1948 as the result of a collision between the Studebaker automobile driven by the said Glenn C. Fetter and a truck which was being operated in a westerly direction on and along highway 40.

4. That said truck being driven west on said highway 40 [fols. 74-75] was turned over on its right side as the result of said collision with the Studebaker car driven by the said Glenn C. Fetter.

5. That the Studebaker automobile driven by Glenn C. Fetter was completely demolished in the collision.

6. That the following is a true and correct copy of Ordinance No. 18 regulating the speed and management of automobiles within the corporate limits of the Village of Montrose, Effingham County, State of Illinois:

"Ordinance No. 18

An ordinance Regulating the speed and management of automobiles within the corporate limits of the Village of Montrose:—

Section 1. Be it ordained by the President and Board of Trustees of the Incorporated Village of Montrose, Effingham County, Illinois; That it shall be unlawful for any owner, manager, or person in the possession or control of any automobile, to run or propel the same on or through the streets, within the limits of said Village, at a greater rate of speed than ten miles per hour, or purposely, heedlessly and recklessly manage and control the same, in such a manner as to be dangerous to persons or property, within said Village. Any

person or persons violating any of the provisions of this ordinance shall be subject to a penalty of not less than ten dollars nor more than two hundred dollars for each offense; and it shall be the duty of the Police Constable to arrest any person or persons he may observe violating any of the provisions of this ordinance, and take such person or persons before the Police Magistrate of said Village, and there file a complaint against such person or persons, that they may be tried for the violation of this ordinance.

Passed July 5th, 1904. Approved July 5th, 1904. N. J. Faber, Village President, John Gaebel, Jr., Village Clerk."

Dated, January 14, 1949.

Backus & Parson, Attorneys for Plaintiff.

Received. Jan. 14, 1949. Hannan, Johnson & Goldschmidt.

[fol. 76] [File endorsement omitted]

IN CIRCUIT COURT OF MILWAUKEE COUNTY

[Title omitted]

AFFIDAVIT OF DEFENDANT, GLENN C. FETTER, IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT—Filed May 16, 1949

STATE OF WISCONSIN,
Milwaukee County, ss:

Glenn C. Fetter, being first duly sworn, on oath, deposes and says that he is one of the defendants in the above entitled action; that, as such defendant, he has knowledge of the facts herein set forth and makes this affidavit in support of a motion of the defendants for a summary judgment dismissing the complaint upon its merits, with costs; that he makes this affidavit on his own behalf and on behalf of his co-defendant, Farmers' Mutual Automobile Insurance Company, a Wisconsin corporation, with whom he is united in interest and by whom he is duly authorized to do so; that plaintiff's action is one brought by the plaintiff to recover damages resulting from the alleged wrongful death

of Harold G. Hughes, deceased son of Corbin D. Hughes, plaintiff and administrator of the estate of the said Harold G. Hughes, deceased, occasioned by the alleged negligent operation of a motor vehicle by affiant within the State of Illinois on January 9th, 1948; that, upon information and belief, the said Harold G. Hughes, plaintiff's intestate deceased, died on the 11th day of January, 1948, in the City of Effingham, Effingham County, State of Illinois, as a result of injuries sustained by him in the accident, as aforesaid, as more fully appears from the allegations of the verified complaint on file herein and particularly from the allegations of paragraph 9 of the first alleged cause [fol. 77] of action of said complaint and by the allegations of paragraph 4 of the second alleged cause of action of said complaint; and that he believes that this action has no merit as to the defendants for the reason that it appears from the foregoing and from the face of the complaint that the action is not one brought for a death caused in the State of Wisconsin and is not, therefore, maintainable under the provisions of Section 331.03, Wisconsin Statutes, and that, therefore, no cause of action, as alleged, or otherwise, exists against the defendants, or either one of them.

Glenn C. Fetter.

Subscribed and sworn to before me this 11th day of May, 1949. W. J. Goldschmidt, Notary Public, Milw. County, Wis. My commission expires Oct. 30, 1949.

[fol. 78] [File endorsement omitted]

IN CIRCUIT COURT OF MILWAUKEE COUNTY

[Title omitted]

AFFIDAVIT ON BEHALF OF DEFENDANTS IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT—Filed May 16, 1949

STATE OF WISCONSIN,
Milwaukee County, ss:

W. J. Goldschmidt, being first duly sworn, on oath, deposes and says that he is one of the attorneys for the defendants in the above entitled action; that, as such attor-

ney, he has knowledge of the facts herein set forth and makes this affidavit in support of a motion of said defendants for a summary judgment dismissing the complaint upon its merits, with costs; that he is duly authorized to make this affidavit for and on behalf of said defendants; that plaintiff's action is one brought by plaintiff to recover damages resulting from the alleged wrongful death of Harold G. Hughes, deceased, occasioned by the alleged negligent operation of a motor vehicle by the defendant, Glenn C. Fetter, within the State of Illinois on January 9th, 1948; that, upon information and belief, said Harold C. Hughes died on the 11th day of January, 1948, in the City of Effingham, Effingham County, State of Illinois, as a result of injuries sustained in said accident, as more fully appears from the allegations contained in paragraph 9 of the first alleged cause of action of the verified complaint on file herein and by the allegations contained in paragraph 4 of the second alleged cause of action of said complaint; and that he believes that this action has no merit as to the defendants, Glenn C. Fetter and the Farmers' Mutual [fol. 79] Automobile Insurance Company, a Wisconsin corporation, for the reason that it appears from the foregoing and from the face of the complaint that the action is not one brought for a death caused in the State of Wisconsin; and is not, therefore, maintainable under the provisions of Section 331.03, Wisconsin Statutes, and that, thereforé, no cause of action, as alleged, or otherwise, exists against the defendants, or either one of them.

W. J. Goldschmidt.

Subscribed and sworn to before me this 11th day of May, 1949. Herbert L. Hible, Notary Public, Milwaukee County, Wis. My commission expires 9-10-50.

Copy received this 12th day of May, 1949. Backus & Parson, Attorneys for Plaintiff.

[fol. 80] [File endorsement omitted]

IN CIRCUIT COURT OF MILWAUKEE COUNTY

[Title omitted]

AFFIDAVIT IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT —Filed May 20, 1949

STATE OF WISCONSIN,
Milwaukee County, ss:

Francis H. Parson, being first duly sworn on oath deposes and says that he is the attorney for the plaintiff in the above entitled action and makes this affidavit on plaintiff's behalf, being duly authorized so to do.

This action was commenced on or about July 2, 1948 by plaintiff as administrator of the estate of Harold G. Hughes, on behalf of the next of kin of said Harold G. Hughes, consisting of Corbin D. Hughes, his father, his step-mother, Dorothy Hughes, and his brother, Dale Hughes. Any recovery made in this action will be distributed to the next of kin.

This action for wrongful death is brought under Sections 1 and 2, Chapter 70, Smith and Hurd Illinois Annotated Statutes, a copy of which sections are included in Exhibit "A" and made a part hereof and a part of the record in this case as if specifically set forth herein.

This action is not brought under Wisconsin's wrongful death statute, Section 331.03 for the reason that the wrong-
[fol. 81] ful act as set forth in the complaint occurred in the State of Illinois under the Illinois rules of the road and the death occurred in the State of Illinois.

The right relied upon by the plaintiff was created by the foregoing law of the State of Illinois. The law of Wisconsin does not create a right of action for a death occurring in another state, but Wisconsin allows a suit on a foreign right of action for wrongful death to be brought in its courts.

That there is involved herein, as appears by the allegations of the complaint, the host-guest statute of Illinois, Section 58A of Chapter 95½ of Smith and Hurd Annotated Illinois Statutes. The complaint is based entirely upon Illinois law and is based upon the violation of Section 167, Chapter 95½ (Smith and Hurd Illinois Annotated Statutes)

relating to stopping at intersections and section 146A of Chapter 95½ relating to a twenty-five mile an hour speed in residential districts, and a twenty mile per hour — in a business district.

This case has been heard in conciliation before Hon. Daniel W. Sullivan on two occasions, on January 18, 1949 and February 23, 1949, and the Court and counsel for the defendant were fully advised at said times that this case was brought under the Illinois wrongful death statute and for violation of the aforementioned Illinois statutes relating to the laws of the road, and involving the Illinois host-guest statute. Various decisions of the Illinois court relating to damages and negligence under the host-guest statute were discussed at that time. Prior to the service of the complaint in this matter, and after service of the complaint, defendants' counsel were at all times advised by affiant, [fol. 82] and were aware of the same, that this action was brought under the Illinois wrongful death statute for violation of the Illinois laws in connection with the host-guest statute of that state.

That Sections 58A, 167, and 146 of Chapter 95½ of the Illinois Statutes are also set forth in Exhibit "A," attached hereto and made a part of the record in this case as if specifically set forth herein.

This affidavit is made in opposition to a motion for summary judgment and defendants' motion should be denied with costs.

Affiant further asks that the Illinois wrongful death act, Sections 1 and 2, Chapter 70, Smith and Hurd Illinois Annotated Statutes, and the host-guest statute, 58A of Chapter 95½ and Sections 146 and 167 of Chapter 95½, be incorporated in the complaint as paragraph 11 of the first cause of action and paragraph 5 of the second cause of action.

Francis H. Parson.

Subscribed and sworn to before me this 18 day of May, 1949. Ruth Louise Miller, Notary Public, Milwaukee County, Wis.

[fol. 83] EXHIBIT "A" TO AFFIDAVIT

Smith and Hurd Illinois Annotated Statutes:

"Sec. 1. Whenever the death of a person shall be caused by the wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who or company or corporation which would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony."

"Sec. 2. Action—by whom brought—limit of damages—death outside state. Every such action shall be brought by and in the names of the personal representatives of such deceased person, and the amount recovered in every such action shall be for the exclusive benefit of the widow and next of kin of such deceased person, and shall be distributed to such widow and next of kin in the proportion provided by law in relation to the distribution of personal property left by persons dying intestate and in every such action the jury may give such damages as they shall deem a fair and just compensation with reference to the pecuniary injuries resulting from such death, to the wife and next of kin of such deceased person, not exceeding the sum of $15,000. Provided that every such action shall be commenced within one year after the death of such person. Provided further, that no action shall be brought or prosecuted in this state to recover damages for death occurring outside of this state where a right of action for such death exists under the laws of the place where such death occurred and service of process in such suit may be had upon the defendant in such place."

Chapter 95½

"Sec. 58A. No person residing in a motor vehicle as a guest, without payment for such ride, nor his personal representative in the event of the death of such guest, shall have a cause of action for damages against the driver or operator of such motor vehicle or its owner or his employee or agent for injury, death or loss, in case of accident, unless

such accident shall have been caused by the wilful and wanton misconduct of the driver or operator of such motor vehicle or its owner or his employer or agent and unless such wilful and wanton misconduct contributed to the injury, death or loss for which action is brought."

"Nothing contained in this section shall be construed to relieve a motor vehicle carrier of passenger for hire of responsibility for injury or death sustained by any passenger for hire."

"Sec. 167. Vehicle entering through highway or stop intersection. The department may in its discretion and when traffic conditions warrant such action, give preference to traffic upon any of the State Highways under its jurisdiction, upon which has been constructed a durable, hard-surfaced road over traffic crossing or entering such high- [fols. 84-87] way by erecting appropriate stop signs or stop lights and in such case vehicles entering upon or crossing such highway should come to a full stop as near the right-of-way line of such highway as possible and regardless of direction shall give right of way to vehicles upon the highway."

"Sec. 146A. No person shall drive a vehicle of the first division as described in Article I of this act, upon any public highway in this -tate at a speed greater than is reasonable and proper having regard to the traffic and use of the way or so as to endanger the life or limb or injure the property of any person. If the rate of speed of any motor vehicle of said first division, operated upon any public highw y in this state where the same passes through the business district of any city, village or incorporated town exceeds twenty miles an hour, or if the rate of speed of any such motor vehicle operated on any public highway in this state where the same passes through the residence district of any city, village or incorporated town exceeds 25 miles an hour, or if the rate of speed of any such motor vehicle operated on a public highway in this State in a suburban district, exceeds thirty-five miles an hour, such rates of speed shall be prima facie evidence that the person operating such motor vehicle is running at a rate of speed greater than is reasonable and proper having regard to the traffic and use of the way or so as to endanger the life or limb or injure the property of any person."

[fol. 88] [File endorsement omitted]

IN CIRCUIT COURT OF MILWAUKEE COUNTY

[Title omitted]

AFFIDAVIT IN SUPPORT OF MOTION FOR LEAVE TO AMEND—
Filed May 20, 1949

STATE OF WISCONSIN,
Milwaukee County, ss.

Francis H. Parson, being first duly sworn on oath deposes and says that he is the attorney for the plaintiff in the above entitled action and makes this affidavit in plaintiff's behalf, being duly authorized so to do, in support of an application for leave to amend. That this action was commenced on the 2nd day of July, 1948, and brought to recover for a wrongful death occurring in Illinois under the Illinois wrongful death action.

The wrongful death statute of Illinois and the laws of the road of Illinois were not set out in detail in said complaint, due to the fact that this court takes judicial notice of these statutes as a matter of law under Section 328.01 Wisconsin Statutes.

That this case has been heard in conciliation before Hon. Daniel W. Sullivan on two occasions on January 18, 1949 and February 23, 1949, and the Court and counsel for the defendant were advised that this case was brought under [fol. 89] the Illinois wrongful death statute and for the violation of the Illinois law of the road, and subject to the host-guest law of Illinois. That prior to the service of the summons and complaint, defendant's counsel had also been so advised. Defendants have not been taken by surprise.

Defendants' motion for summary judgment has raised some question as to under what statute and what law this action is brought. In the interest of protecting the plaintiff's rights and in the furtherance of justice, plaintiff asks that the complaint be amended as set forth in this motion.

Francis H. Parson.

Subscribed and sworn to before me this 18 day of May, 1949. Ruth Louise Miller, Notary Public, Milwaukee County, Wis.

[fol. 90] [File endorsement omitted]

IN CIRCUIT COURT OF MILWAUKEE COUNTY

[Title omitted]

ORDER FOR SUMMARY JUDGMENT DISMISSING THE COMPLAINT —Filed November 17, 1949

The motion of the defendants for a summary judgment against the plaintiff having come on for hearing before that branch of the above named court presided over by the Hon. Charles L. Aarons, Circuit Judge, on the 20th day of May, 1949, the said defendants appearing by Hannan, Johnson & Goldschmidt, represented by Herbert L. Wible, their attorneys, and the plaintiff appearing by Backus & Parson, represented by Francis H. Parson, its attorneys, and the Court having been well and sufficiently advised in the premises and having made and filed a memorandum decision herein, dated the 28th day of October, 1949, wherein it is decided that the defendants' motion for summary judgment dismissing the complaint must be granted;

Now, Therefore, on motion of Hannan, Johnson & Goldschmidt, attorneys for defendants;

It Is Ordered that judgment be entered herein in favor of the defendants, Glenn C. Fetter and Farmers' Mutual Automobile Insurance Company, a Wisconsin corporation, and against the plaintiff, Corbin D. Hughes, Administrator of the Estate of Harold G. Hughes, dismissing the complaint on the merits, together with costs and disbursements.

Dated at Milwaukee, Wisconsin, this 10th day of November, 1949.

By the Court:

Chas. L. Aarons, Circuit Judge.

Copy received 11/11/49. Francis H. Parson.

[fol. 91] [File endorsement omitted]

IN CIRCUIT COURT OF MILWAUKEE COUNTY

[Title omitted]

SUMMARY JUDGMENT IN FAVOR OF DEFENDANTS AND AGAINST THE PLAINTIFF—Filed November 25, 1949

The motion of the defendants for summary judgment herein having come on for hearing before that branch of the above named court presided over by the Hon. Charles L. Aarons, Circuit Judge, on the 20th day of May, 1949, the said defendants appearing by their attorneys, Hannan, Johnson & Goldschmidt, represented by Herbert L. Wible, and the plaintiff appearing by his attorneys, Backus & Parson, represented by Francis H. Parson, and the court having made its order, dated the 10th day of November, 1949, wherein it is directed that judgment be entered in favor of the defendants and against the plaintiff, dismissing the complaint on its merits, together with costs and disbursements.

Now, Therefore, pursuant to said order and upon motion of Hannan, Johnson & Goldschmidt, attorneys for the defendants;

It Is Adjudged and Decreed that the complaint in the above entitled action be, and the same hereby is, dismissed upon its merits.

It Is Further Adjudged and Decreed that the defendants, Glenn C. Fetter and Farmers' Mutual Automobile Insurance Company, a Wisconsin corporation, do have and recover of the plaintiff, Corbin D. Hughes, Administrator of the Estate of Harold G. Hughes, the sum of One Hundred Six and 70/100 ($106.70) Dollars, costs and disbursements. [fol. 92] Dated at Milwaukee, Wisconsin, this 25th day of November, 1949, at 2:50 P. M.

By the Court:

Fred J. Jaeger, Clerk, by Arthur A. Schumann, Deputy Clerk.

[fol. 93] [File endorsement omitted]

Copy

In Circuit Court of Milwaukee County

Corbin D. Hughes, Administrator of the Estate of Harold G. Hughes, Plaintiff,

vs.

Glenn C. Fetter and Farmers Mutual Automobile Insurance Company, a Wisconsin Corporation, Defendants

Decision on Defendants' Motion for Summary Judgment

October 28, 1949. Hon. Chas. L. Aarons, Judge

The action is one to recover damages because of the death of Harold G. Hughes by the wrongful act of the defendant Fetter. The defendants have moved for a summary judgment. At the time of the oral argument upon such motion the plaintiff presented a motion to amend his complaint by incorporating certain Illinois statutes governing actions for damages for death by wrongful act; and bearing upon liability and upon the duties of operators of motor vehicles. Such proposed amendment may be considered as allowed.

Defendants' motion for summary judgment is grounded upon the proposition that the death of Harold G. Hughes (which occurred in Illinois on January 11, 1948) is alleged to have been caused by negligent conduct of the defendant [fol. 94] in operating an automobile (in which Harold G. Hughes was a passenger) in Effingham County in the State of Illinois on January 9, 1948. Defendants contend that the action is not one "brought for a death caused in this state" and is therefore not maintainable by reason of the proviso contained in section 331.03, Wis. Stats. It appears to be conceded that both Hughes (the decedent) and the defendant Fetter were Wisconsin residents at the time of the accident; and that said defendant still resides in this state.

The plaintiff administrator (who was appointed by the County Court of Milwaukee County) predicates his cause of action upon the Illinois death statute. A copy of that statute is contained in Exhibit "A" attached to plaintiff's affidavit in opposition to the motion for summary judgment. A copy is also appended hereto (see page 11).

The Wisconsin statute on the subject is section 331.03 (Stats. 1947). It reads as follows:

> "331.03 *Recovery for death by wrongful act.* Whenever the death of a person shall be caused by a wrongful act, neglect or default and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who, or the corporation which, would have been liable, if death had not ensued, shall be liable to an action for damages notwithstanding the death of the person injured; *provided, that such action shall be brought for a death caused in this state.*" (Italics added.)

The sole question presented is whether the instant action is maintainable notwithstanding the above quoted proviso.

Plaintiff contends that the Wisconsin statute is inapplicable since he alleges that he brings his action under the Illinois Wrongful Death Statute. He cites section 391 of the Restatement on Conflict of Laws to the effect that

> "The law of the place of wrong governs the right of action for death";

and section 392:

> [fol. 95] "Action for the death of a person will be allowed in any state on a right of action created by the law of the place of wrong, if the right of action is given to compensate a person or persons injured by the death for the loss caused thereby."

The Wisconsin annotations supplementing these sections indicate that Wisconsin cases are in accord with the Restatement rule on the subject.

The rule referred to is, however, not in all cases a matter of strict right. It will be so regarded where the right to sue is, under the applicable facts, protected by the "full faith and credit" clause (Sec. 1 of Art. IV) or by Sec. 2 of Art. IV of the U. S. Constitution (the latter section declaring that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several

states"). Where such constitutional sanctions are not involved the principles of comity govern.

> "By the rules of comity, the courts of one state will voluntarily enforce the laws of a friendly state or nation when, by such enforcement, they will not violate their own public policy or laws or injuriously affect the interests of their own state or of their own citizens." *Disconto Gesellschaft v. Umbreit*, 127 Wis. 651, 658 to 660.

By reason of the restricting effect of the proviso in section 331.03, Wis. stats. the situation here presented is governed by the following rule which in the language of the Restatement of Conflict of Laws, reads as follows:

> "§ 612. *Action Contrary to Public Policy.* No action can be maintained upon a cause of action created in another state the enforcement of which is contrary to the strong public policy of the forum."

See also the substituted Comment (a) to said section 612 (Conflict of Laws) as contained in the 1948 supplement of the Restatement (p. 175).

Upon an examination of a large number of the decisions bearing upon the subject here considered the court is of the opinion that the principles which prevail in Wisconsin [fol. 96] as well as in Illinois are accurately stated in the following quoted paragraph from Vol. 11 *American Jurisprudence* at page 495:

> "§ 183. *Actions Contravening Public Policy.*—It is conceded by all the courts that it is not strict right, but comity, which enables one to bring an action in one state or country for a tort, such as negligent death or bodily injuries, caused in another, and that under the principles of comity, such action will not be entertained if it would violate the public policy of the forum. Thus, a state may refuse the maintenance of an action on a tort arising elsewhere. A statute forbidding the maintenance within the state of actions brought on injury statutes of other states does not contravene a provision of the Federal Constitution requiring each state to give full faith and credit to the public acts, records, and judicial proceedings of every other state.

> Moreover, forbidding the maintenance within the state of actions for personal injuries arising outside the state does not contravene a constitutional provision that every person ought to find a remedy in the law for all injuries and wrongs that he may receive in his person, property, or reputation."

See also the discussion of "*Comity*" in the same work, 11 Am. Jur., pages 296-306.

One of the cases referred to in § 183 (above quoted) is *Dougherty v. American McKenna Process Co.*, 255 Ill. 369, 99 N. E. 619, L. R. A. 1915 F. p. 955. The case presents a close parallel to the instant situation—the only difference being in the phrasing of the Illinois statutory proviso having reference to actions for damages for wrongful death.

In the *Dougherty Case* the deceased—a citizen and resident of Illinois—was injured while in the employ of the defendant at Elizabeth, New Jersey and died in the latter state from the effect of his injury. The action was commenced in Illinois by the administrator of the deceased who was appointed by an Illinois Probate Court. The action was however alleged to be based upon a pleaded statute of New Jersey. Section 2 of the Injuries Act of Illinois provided that

> "No action shall be brought or prosecuted in this state to recover damages for a death occurring outside of this state."

[fol. 97] The trial court sustained a general demurrer to the complaint because of said proviso in the Illinois Injuries Act. Upon an appeal to the Illinois Supreme Court the plaintiff contended that the statutory provision referred to

> "does not prevent the bringing of an action in this state (Illinois) for death caused by wrongful act in another state, provided it is brought on the statute of such other state and not on the statute of Illinois; that, if this is not the proper construction of the statute above quoted, then such statute is unconstitutional." (99 N. E. page 620)

The court refused to assent to either of said contentions.

Quoting (in part) from the opinion of the court (Id. 620, 621):

"At common law no right of action existed for the recovery of damages for injury resulting in the death of a person caused by another's wrongful act. Such a right of action is statutory. * * * The acts of the Legislature of a state can have, in themselves, no extra-territorial effect. To put the interpretation upon this section now contended for by counsel would practically render it meaningless * * *.

A further contention of counsel is that if this statute applies to actions brought here, based upon the statute of another state, then it is in contravention of section 1 of article 4 of the United States Constitution, which provides that 'full faith and credit shall be given, in each state, to the public acts, records and judicial proceedings of every other state,' and also of paragraph 1 of section 2 of said article, which provides that 'the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.' * * *

It was not intended by the provisions of the federal Constitution relied on by counsel to give to the laws of one state any operation in other states except by a permission, express or implied, by those states. *Paul v. Virginia*, 8 Wall. 168, 19 L. Ed. 357. * * * *This rule applies with full force to statutes giving a right of action for death by the wrongful act of another. If they are administered outside of the state where they are enacted, it is only on the principles of comity.* In this country the courts will generally enforce the law of the place where the injury occurred, unless to do so is contrary to the law, morals, or policy of the forum. (Citing) * * * *If the policy of the forum has been expressed positively in a statute, that policy must prevail.* When the Legislature speaks upon a subject upon which it has constitutional power to legislate, *public policy is what the statute indicates.* (Citing) * * * Each state, subject to restrictions of the federal [fol. 98] Constitution, determines the limits of the jurisdiction of its courts, the character of the controversies which shall be heard in them, and how far its courts having jurisdiction of the parties shall hear and decide transitory actions where the cause of action has

arisen outside of the state. (Citing) * * * Different states may have different policies, and the same state may have different policies at different times, provided that any policy the state may choose to adopt must *operate the same way on its own citizens and those of other states. Chambers v. Baltimore & Ohio Railroad Co.*, 207 U. S. 142, 28 Sup. Ct. 34, 52 L. Ed. 143. In this last case it was held that a statute of Ohio providing that no action could be maintained in that State for wrongful death occurring in another state, except where the deceased was a citizen of Ohio, did not violate the federal Constitution. A dissenting opinion, joined in by three members of the court, in effect conceded that *had the Ohio court excluded from the courts of that state all actions for personal injuries arising in other states it would have been constitutional.* The reasoning of that decision as to the right of a state to exclude actions of the kind here in question fully sustains the validity, under the federal Constitution, of the provision of the Injuries Act above referred to. * * * (Id. p. 621)

It necessarily follows that the trial court rightly held that the courts of this state were without jurisdiction to entertain this cause of action, and the judgment of that court will be affirmed." (Italics added)

The above quoted views of the Illinois court authoritatively supported by the U. S. Supreme Court (*Chambers Case, supra*) and many other cases cited in the opinion (omitted in the above quotation) also received sanction in a number of Wisconsin cases although the precise question raised in the instant case has not been passed upon in this state so far as known to the writer. *Finney* v. *Guy*, 106 Wis. 256 (Syl. 3), 276, 277, 49 L. R. A. 486 (affirmed by U. S. Supreme Court, 189 U. S. 335, 47 L. Ed. 839); *Robertson* v. *Chicago etc. R. Co.*, 122 Wis. 66, 72 (citing and discussing *Texas & P. R. Co.* v. *Cox*, 145 U. S. 593, 604-606, 36 L. Ed. 829, 833); *Bain* v. *Northern Pacific R. Co.*, 120 Wis. 412, 418, 419; *Fox* v. *Postal Telegraph-Cable Co.*, 138 Wis. 648, 652, 653; *Presbyterian Ministers' Fund* v. *Thomas*, 126 Wis. 281, 285; *International Harvester Co.* v. [fol. 99] *McAdam*, 142 Wis. 114, 121; *Bartlett* v. *Collins*, 109 Wis. 477, 482; *Porte* v. *C. & N. W. R. Co.*, 162 Wis. 446, 451.

It should be noted that the constitutional provision contained in Sec. 2 of Art. IV of U. S. Constitution is applicable in the event there should be any attempted impairment of the right of a citizen of another state to exercise the same right to sue in the courts of Wisconsin *that citizens of Wisconsin* have. *Eingartner* v. *The Illinois Steel Co.*, 94 Wis. 70; *State ex rel. Smith* v. *Belden*, 205 Wis. 158, 161, 162; *Chambers* v. *Baltimore & Ohio R. Co.*, 207 U. S. 142; 52 L. Ed. 143, 146 and 147; *Paul* v. *Virginia*, 8 Wall. 168, 19 L. Ed. 357, 360 (where *Mr. Justice Field* says:

> "It was undoubtedly the object of the clause in question to place the citizens of each state upon the same footing with citizens of other states, so far as advantages resulting from citizenship in those states are concerned.")

While the language of the proviso in the Illinois statute as quoted in the *Daugherty Case, ante* p. 5, is framed in the negative terms, and also has reference to the state where the death occurred, instead of—as in Wisconsin—to the state where the death was caused, it is not perceived that there is any substantial difference in the effect of the two statutes.

It should be noted not only that both the decedent in the instant case and the defendant were citizens of Wisconsin but that irrespective of such fact there is nothing in the Wisconsin Act (Sec. 331.03) which imposes restrictions upon non-residents which are not likewise imposed upon residents of the state of Wisconsin.

The plaintiff's position in denying the applicability of the Wisconsin statute is also asserted to be based upon the doctrine that "all legislation is *prima facie* territorial and it does not operate beyond the limits of the jurisdiction in [fol. 100] which it is enacted." *Bernard* v. *Jennings*, 209 Wis. 116, 120 (cited in plaintiff's brief). The distinction between the facts of that case and the instant one is obvious and requires no discussion. However, as considerable stress has been placed upon the matter of extraterritorial legislation it may be appropriate to point out

(1) *As to the Wisconsin Statute:* There is no valid ground for asserting that the proviso in question is intended to have force in other states. It has force however whenever *within its own boundaries* claims are asserted which are in contravention of its provision.

(2) *As to the Illinois Statute:* In so far as the enforcement would operate to defeat the Wisconsin statutory provision it can have no force or effect in this state. Otherwise the Illinois statute would be given extraterritorial force.

Plaintiff's counsel directs attention to *Sheehan* v. *Lewis*, 218 Wis. 588, and other Wisconsin cases where actions for wrongful death—although caused in other states—were maintained in this state. It appears that in those cases the issues involved and considered did not include the specific question here raised. Those cases, therefore, cannot be considered as authoritative upon the question here presented.

In the *Sheehan Case* it appeared that Illinois—where the injury causing death occurred—had a statute prohibiting actions in that state to recover damages for death occurring outside of the state. A doctrine of reciprocity was contended for by the defendant in that case to bar the Wisconsin action, since Illinois under its statutes would have barred an action in that state for a death occurring outside of that state. Our court in disagreeing with that contention quoted the Illinois statutory provision and added: "Wis. [fol. 101] consin has no such statute." The court quoted the first paragraph of Sec. 2 of Art. IV, U. S. Constitution, and added: "Citizens of other states have the same right to sue in the courts of Wisconsin that citizens of Wisconsin have." (218 Wis. at page 593) It is apparent that the fact was overlooked that Sec. 331.03 then—as at present—contained the proviso under which an action for damages for death by wrongful act could be maintained only if such action is brought "for a death caused in this state." As above indicated the proviso in order to have any force or effect possesses the same meaning as the negative form appearing in the Illinois statute.

The only case brought to the attention of the court dealing directly with the proviso contained in section 331.03 (then known as section 4255) is *Budigor* v. *Chicago, etc. R. Co.*, 94 Wis. 191. The point determined in that case was that even though the death occurred in another state, action could be maintained in the Wisconsin courts if the death was *caused in* this state. *Id.* 192, 194, 195. The court said:

> "The object and effect of the proviso to our statute was to render the action local, and limit it to cases where death was caused by acts committed or occurring

within the state, without regard to whether the death occurred within or without it." *Id.* 195, 196.

Conclusion.

The words "provided that such action shall be brought for a death caused in this state" appearing at the end of the Wisconsin statute (Sec. 330.03) necessarily mean that the right to bring actions for wrongful death (a right non-existent at common law, *Schwab* v. *Nelson*, 249 Wis. 563, 565) is granted *only* in cases where the death was caused in this state. It therefore necessarily excludes cases where the death was caused in other states. The statute of another state cannot be made the basis of an action in Wisconsin [fol. 102] whose maintenance would be wholly inconsistent with the declared public policy of our legislature. To hold that this action could be maintained notwithstanding the fact that the death was not caused in this state would be to override such public policy as declared by statute; and would operate to deprive the proviso of purpose or meaning. As is shown by the above cited cases the conclusion here reached is not only in accordance with the rule of the U. S. Supreme Court and the Wisconsin Supreme Court but it is the law in the very state (Illinois) under whose wrongful death act the instant action is alleged to have been commenced. (*Dougherty Case, ante* pp. 5-7).

For the reasons stated the defendant's motion for a summary judgment dismissing the complaint must be granted.

(S.) Chas. L. Aarons, Circuit Judge.

Dated at Milwaukee, Wisconsin this 28th day of October, 1949.

[fol. 103] "Exhibit 'A'

Smith and Hurd Illinois Annotated Statutes

'Sec. 1. Whenever the death of a person shall be caused by the wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the party insured to maintain an action and recover damages in respect thereof, then and in every such case the person who or company or corporation which would have been liable if death had not ensued, shall be liable to

an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony.

Sec. 2 Action—by whom brought—limit of damages—death outside state. Every such action shall be brought by and in the names of the personal representative of such deceased person, and the amount recovered in every such action shall be for the exclusive benefit of the widow and next of kin of such deceased person, and shall be distributed to such widow and next of kin in the proportion provided by law in relation to the distribution of personal property left by persons dying intestate and in every such action the jury may give such damages as they shall deem a fair and just compensation with reference to the pecuniary injuries resulting from such death, to the wife and next of kin of such deceased person, not exceeding the sum of $15,000. Provided that every such action shall be commenced within one year after the death of such person. Provided further, that no action shall be brought or prosecuted in this state to recover damages for death occurring outside of this state where a right of action for such death exists under the laws of the place where such death occurred and service of process in such suit may be had upon the defendant in such place.'"

[fol. 104] In Supreme Court of Wisconsin

Corbin D. Hughes, Administrator of the Estate of Harold G. Hughes, Appellant,

vs.

Glenn C. Fetter and Farmers Mutual Automobile Insurance Company, a Wisconsin Corporation, Respondents

Minute Entry—March 8, 1950

And now at this day came the parties herein, by their attorneys and this cause having been argued by Samuel Goldenberg, Esq., for the said appellant, and by Herbert Wible, Esq., for the said respondent, and submitted, and the Court not being now sufficiently advised of and concerning its decision herein, took time to consider of its opinion.

[fol. 105-106] In Supreme Court of Wisconsin, Milwaukee Circuit Court

Corbin D. Hughes, Administrator of the Estate of Harold G. Hughes, Appellant,

vs.

Glenn C. Fetter and Farmers Mutual Automobile Insurance Company, a Wisconsin Corporation, Respondents

Opinion by Justice Fairchild

Judgment—May 2, 1950

This cause came on to be heard on appeal from the judgment of the Circuit Court of Milwaukee County and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the Circuit Court of Milwaukee County, in this cause, be, and the same is hereby, affirmed with costs against the said appellant taxed at the sum of One Hundred Four Dollars and Fifty Cents ($104.50).

Justices Broadfoot and Brown dissent.

[fol. 107] In Supreme Court of Wisconsin, August Term, 1949

No. 187

Corbin D. Hughes, adm'r. of the Estate of Harold G. Hughes, Appellant,

v.

Glenn C. Fetter et al., Respondents

Appeal from judgment of the circuit court for Milwaukee county, Charles L. Aarons, circuit judge

Affirmed.

Opinion—Filed May 2, 1950

Corbin D. Hughes, administrator of the estate of Harold G. Hughes, brought this action against Glenn C. Fetter and Farmer Mutual Automobile Insurance Company, a Wis-

consin corporation, to recover damages for wrongful death based on the Illinois wrongful death statute, sections 1 and 20, Chapter 70, Smith-Hurd Illinois Annotated Statutes. The action was begun July 7, 1948. Defendant moved for summary judgment, and judgment was directed dismissing the plaintiff's complaint on the merits, November 25, 1949. Plaintiff appealed.

[fol. 108] Judge Aarons, who heard the matter, states the problem as follows:

"Defendants' motion for summary judgment is grounded upon the proposition that the death of Harold G. Hughes (which occurred in Illinois on January 11, 1948) is alleged to have been caused by negligent conduct of the defendant in operating an automobile (in which Harold G. Hughes was a passenger) in Effingham county, in the state of Illinois, on January 8, 1948. Defendants contended that the action is not one 'brought for a ddath caused in this state' and is therefore not maintainable by reason of a proviso contained in section 331.03 Wis. Stats. It appears to be conceded that both Hughes, the decedent, and the defendant Fetter were Wisconsin residents at the time of the accident and that said defendant still resides in this state.

"The plaintiff administrator (who was appointed by the County Court of Milwaukee County) predicates his cause of action on the Illinois death statute."

[fol. 109] FAIRCHILD, J.:

The Wisconsin statute, section 331.03 which the learned trial judge ruled prevented the maintenance of the action and required a dismissal of the complaint does permit recovery for death by wrongful act. But it also contains the provision "that such action shall be brought for a death caused in this state." The question is now raised whether for a death in Illinois this action can be maintained in Wisconsin notwithstanding that provision in our statute.

The right to recover for death by wrongful act is purely statutory. The words of the statute, "provided that such action shall be brought for a death caused in this state" seem plain enough to bar cases not within its terms, and to exclude actions where the wrongful act resulting in death occurred in another state. This must be so, unless that provision is unconstitutional, or unless the rules of comity place

an obligation upon the courts of this state to voluntarily try a case arising under the Illinois wrongful death statute.

First, with respect to the constitutionality of the provision: We agree with the learned trial judge that the enactment is not in contravention of the full faith and credit clause of the Federal Constitution or of paragraph 1, section 2 of Article IV providing that the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states. It has been repeatedly declared to be the law that it was not intended by the provisions of the Federal Constitution referred to to give to the laws of one state any operation in other states except by permission, express or implied, by those states. *Paul v. Virginia,* 8 Wall. 168, 19 L. Ed. 357. The rule applies with full force to statutes giving a right of action for death by the wrongful act of another.

The policy of Wisconsin against the maintenance of such an action having been created positively in a statute, that policy must prevail. "Different states may have different policies, and the same state may have different policies at different times, provided that any policy the state may choose to adopt must operate the same way on its own citi- [fol. 110] zens and those of other states." *Chambers v. Baltimore & Ohio Railroad Co.,* 207 U. S. 142, 28 Sup. Ct. 34, 52 L. Ed. 143. In the case of *Dougherty v. American McKenna Process Co.,* 255 Ill. 369, 99 N. E. 619, L.R.A. 1915 F. 955, the Illinois court, in commenting on the Ohio decision, said: "The reason of that decision as to the right of a state to exclude actions of the kind here in question fully sustains the validity under the Federal Constitution of the provision of the injuries act above referred to. . . . It necessarily follows that the trial court rightly held that the courts of this state are without jurisdiction to entertain this cause of action, and the judgment of that court will be affirmed."

The learned trial judge in the case at bar said that "the views of the Illinois court authoritatively supported by the U. S. Supreme Court (*Chambers Case, supra*) and many other cases cited in the opinion (in *Dougherty v. American McKenna Process Co., supra*) also receive sanction in a number of Wisconsin cases although the precise question raised in the instant case has not been passed upon in this state. . . . *Finney v. Guy,* 106 Wis. 256 (Syl. 3), 276,

277, 49 L.R.A. 486 (affirmed by U. S. Supreme Court, 189 U. S. 335, 47 L. Ed. 839; *Robertson v. Chicago etc. R. Co.*, 122 Wis. 66, 72 (citing and discussing *Texas & P. R. Co. v. Cox*, 145 U. S. 593, 604-606, 37 L. Ed. 829, 833); *Bain v. Northern Pacific R. Co.*, 120 Wis. 412, 418, 419; *Fox v. Postal Telegraph-Cable Co.*, 138 Wis. 648, 652, 653; *Presbyterian Ministers' Fund v. Thomas*, 126 Wis. 281, 285; *International Harvester Co. v. McAdam*, 142 Wis. 114, 121; *Bartlett v. Collins*, 109 Wis. 477, 482; *Porte v. C. & N. W. R. Co.*, 162 Wis. 446, 451.

Now as to the matter of comity: In this state the courts will generally enforce the law of the place where the injury occurred, unless to do so is contrary to the law, morals or policy of the state where the action is sought to be maintained. However, if the policy of the forum has been expressed positively in a statute, that policy must prevail. "When the legislature speaks upon a subject upon which it has constitutional power to legislate, public policy is what [fol. 111] the statute indicates." *Harding v. American Glucose Co.*, 182 Ill. 551; *People v. Shedd*, 241 Ill. 155; *Ziegler v. Illinois Trust and Savings Co.*, 245 Ill. 180; *Miner on Conflict of Laws*, section 6, page 10. By virtue of the doctrine of comity, rights acquired under statute enacted or judgment rendered in one state will be given force and effect in another, unless, as said, against policy or laws of the state, prejudicial to interests of its citizens or against good morals and natural justice; comity being a rule of practice, however, and not a rule of law. *In re Chase*, 141 S.E. 471, 473, 195 N.C. 143. The doctrine of comity results in recognition of a decree of a different state not entitled to full faith and credit. It is neither a matter of absolute obligation nor of mere courtesy and good will, but is recognition which one state allows within its territory to legislative, executive or judicial acts of another, having due regard to duty and convenience and to rights of its own citizens. 11 *Am. Jur., section* 183, page 495, *Corpus Juris Secundum*, Vol. 15, page 245, *Strawn Mercantile Co. v. First Nat. Bank, Tex.*, 279 S.W. 473, 474; *Baker River & S. R. Co. v. Nichols*, 99 P. 876, 877, 51 Wash. 619.

Plaintiff in support of his position here urges the doctrine that all legislation is *prima facie* territorial and does not operate beyond the jurisdiction in which it is enacted. He cites *Bernard v. Jennings*, 209 Wis. 116, 120. The distinc-

tion between the facts of that case and the instant one is obvious. The learned trial judge, because of the stress placed upon the matter of extraterritorial legislation, thought it appropriate to point out that as to the Wisconsin statute there is no valid ground for asserting that the proviso in question is intended to have force in other states. It has force, however, whenever within its own boundaries claims are asserted. As to the Illinois statute, he said: "In so far as its enforcement would operate to defeat the Wisconsin statutory provision it can have no force or effect in this state; otherwise the Illinois statute would be given extraterritorial force."

Plaintiff's counsel directs attention to the case of *Sheehan v. Lewis*, 218 Wis. 588 and other Wisconsin cases where actions for wrongful death—although caused in other [fol. 112] states—were maintained in this state, after the enactment of our statute. It appears that in those cases the particular point involved and here considered was not advanced. Those cases, therefore, cannot be considered as authoritative upon the question here presented. They did not change the statute. In the *Sheehan case, supra*, it appeared that Illinois, where the injury causing death occurred, then had the same statute which has been referred to in this case, prohibiting actions in that state to recover damages for death occurring outside of the state. In that case a doctrine of reciprocity was contended for by the defendant to bar the action in Wisconsin, since Illinois under its statute would have barred an action in that state for a death occurring in this state. Our court in disagreeing with that contention quoted the Illinois statutory provision and added these words: "Wisconsin has no such statute." There was then quoted the first paragraph of section 2 of Article IV, U. S. Constitution, and we added: "Citizens of other states have the same right to sue in the courts of Wisconsin that citizens of Wisconsin have." *Sheehan v. Lewis, supra*, p. 593. It is apparent that the full contents of section 331.03 was not given due consideration. And it is evident that the decision resulted from circumstances similar to those referred to in *Kelso Company v. Ellis*, 224 N. Y. 528, 537, where Judge Pound said: "Even in this court a dictum in *Bank of America v. Waydell* (187 N. Y. 113, 120) reveals the habit of bench and bar to look to cases

rather than statutes . . . until attention is sharply directed" to the existence of a policy fixing statute.

The only case brought to the attention of our court dealing directly with the proviso contained in section 331.03 Wis. Stats. is *Rudiger v. Chicago, et. R. Co.*, 94 Wis. 191. The point determined in that case was that even though the death occurred in another state, action could be maintained in the Wisconsin courts, if the death was caused in this state; and we held that the "object and the effect of the proviso in our statute was to render the action local and limit it to cases where death was caused by actions committed or occurring within this state, without regard to whether the death occurred within or without it."

[fols. 113-117] The suggestion that the doctrine of *stare decisis* ought to control our decision upon the matter here involved is without weight. *Reiter v. Grober*, 173 Wis. 493. We do not find that a rule of property was involved, nor do we find any basis existing for the court to review the conclusion reached by the legislature. Its findings are not, under the circumstances, subject to judicial review. Therefore in deference to the determination of the legislature and the plain requirements of its act, any statements made in our opinions in cases heretofore treating with a similar situation which are contrary to the opinion here expressed are withdrawn. As pointed out in the opinion of the learned trial judge, the precise point relating to the statute was not considered in the Wisconsin cases relied upon by the plaintiff.

The statute in another state cannot be made the basis of furnishing a remedy for action in Wisconsin whose maintenance would be wholly inconsistent with the public policy of our state as declared by the legislature. To hold that this action could be maintained notwithstanding that death was not caused in this state would be to override such public policy as declared by statute and would operate to deprive the proviso of purpose or meaning. The plaintiff seeks the benefit of a remedy denied him by the law of the forum. *Estate of Seybold*, 223 Wis. 192. As is shown by the above cited cases, the conclusion here reached is not only in accordance with the ruling of the U. S. Supreme Court and the Wisconsin Supreme Court, but it is the law in the very state, Illinois, under whose wrongful death act the instant

action is alleged to have been commenced. *Dougherty v. McKenna Process Co., supra.*

The defendants' motion for summary judgment dismissing the plaintiff's complaint was properly granted.

By the Court: *Judgment affirmed.*

[fols. 118-119] In Supreme Court of Wisconsin

[Title omitted]

Order Denying Petition for Rehearing—June 30, 1950

The Court being now sufficiently advised of and concerning the motion of the said appellant for a rehearing in this cause, it is now here ordered that said motion be, and the same is hereby, denied with $25.00 costs.

[fol. 120] In the Supreme Court of the United States

— 355

Statement of Points to Be Relied Upon and Designation of Parts of Record to Be Printed—Filed October 19, 1950

(A) Appellant adopts, for his Statement of Points upon which he intends to rely in his appeal to this Court, the points contained in his Assignment of Errors heretofore filed. (Rec. 9-10)

(B) Appellant designates the entire record herein for printing by the Clerk of this Court, except that the following may be omitted:

Rec. 4-5, "Order Allowing Appeal" (print title only).

Rec. 7-8, "Bond" (print title only).

Rec. 11-12, "Citation on Appeal" (print title only).

Rec. 20-26, Appendix A to Jurisdictional Statement, being opinion of the Wisconsin Supreme Court (print title only: "Appendix A, Opinion of Wisconsin Supreme Court —appears at Rec. 106-113.")

Rec. 27-39, Appendix A-1 to Jurisdictional Statement, being opinion of Charles L. Aarons, Circuit Judge of the

Circuit Court of Milwaukee County, Wisconsin (print title only: "Appendix A-1, Opinion of trial court judge—appears at Rec. 93-103, incl.")

[fol. 121] Rec. 47-49, print title only: "Praecipe to the Clerk of the Wisconsin Supreme Court."

Rec. 51-52, print title only: "Proof of Service (papers on appeal to United States Supreme Court)."

Rec. 54-55, print title only: "Notice of Appeal to Wisconsin Supreme Court."

Rec. 56-57, print title only: "Undertaking on Appeal to Wisconsin Supreme Court."

Rec. 57-a, print title only: "Certificate of Clerk."

Rec. 58-59, print title only: "Proofs of Service of Summons and Complaint."

Rec. 60, print title only: "Summons"

Rec. 61-66, In Complaint, *omit* pars. 4, 7 and all of Second Cause of Action.

Rec. 71-72, "Answer of Farmers Mutual Automobile Insurance Company"—*omit* except for caption. (Substantially the same as answer of the individual defendant.)

Rec. 75. *Omit* Notice of Motion for Summary Judgment.

Rec. 85-87, print title only: "Notice of Motion for Leave to Amend Complaint."

Rec. 114-116, print title only: "Motion for Rehearing in Wisconsin Supreme Court."

Rec. 117—print title only: "Order Retaining Record."

Rec. 118—print title only: "Order Denying Motion for Rehearing."

[fol. 122] Rec. 119—print title only: "Certificate of Clerk of the Supreme Court."

Dated at Milwaukee, Wisconsin, this 17th day of October, 1950.

Samuel Goldenberg, Attorney for Appellant.

[fol. 123] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1950

No. 355

ORDER NOTING PROBABLE JURISDICTION—November 13, 1950

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

Endorsed on Cover: Enter Samuel Goldenberg. File No. 54,861. Wisconsin Supreme Court, Term No. 355. Corbin D. Hughes, Administrator of the Estate of Harold G. Hughes, Appellant, vs. Glenn C. Fetter and Farmers Mutual Automobile Insurance Company. Filed October 12, 1950. Term No. 355 O. T. 1950.

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CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 355

CORBIN D. HUGHES, ADMINISTRATOR OF THE ESTATE OF HAROLD G. HUGHES,

Appellant,

vs.

GLENN C. FETTER AND FARMERS MUTUAL AUTOMOBILE INSURANCE COMPANY, A WISCONSIN CORPORATION

APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN

STATEMENT AS TO JURISDICTION

SAMUEL GOLDENBERG,
Counsel for Appellant.

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STATUTES CITED

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IN SUPREME COURT, STATE OF WISCONSIN

AUGUST TERM, 1949

No. 187

CORBIN D. HUGHES, Administrator of the Estate of Harold G. Hughes,

Plaintiff and Appellant,

vs.

GLENN C. FETTER and FARMERS MUTUAL AUTOMOBILE INSURANCE COMPANY, a Wisconsin Corporation,

Defendants and Respondents.

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Rules of the Supreme Court of the United States, as amended, plaintiff-appellant submits herewith his statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the judgment of the Supreme Court of the State of Wisconsin in this cause.

Opinions Below

The opinion of the Supreme Court of the State of Wisconsin is reported in 257 Wis. 35; 42 N. W. 2d 452. A copy

of the opinion is attached hereto as Appendix A. The opinion of Circuit Judge Chas. L. Aarons, Milwaukee County, is attached hereto as Appendix A-1.

Jurisdiction

The decision of the Supreme Court of the State of Wisconsin was filed on May 2, 1950; a motion for rehearing was denied on June 30, 1950. The jurisdiction of the Supreme Court of the United States to review this decision by direct appeal is conferred by Title 28, United States Code, Section 1257.

Question Presented

May a state consistently with the Full Faith and Credit Clause, Section 1, Article IV, United States Constitution, and the Due Process Clause, Section 1, Fourteenth Amendment, United States Constitution, forbid access to its courts to enforce a cause of action for a wrongful death based upon the statutes of a sister state, where the injuries and death occurred in that other state?

Statutes Involved

Section 331.03 of the Revised Statutes of the State of Wisconsin is set forth in Appendix B.

Statement of Facts

Harold G. Hughes, a minor, a resident of Milwaukee, Wisconsin, died on January 11, 1948, in Effingham, Illinois, as the result of injuries sustained in a collision in Effingham County, Illinois, on January 9, 1948. Decedent Hughes was riding as a passenger in the car of the defendant Fetter at the time of the accident.

The driver of the car, Glenn C. Fetter, was also a resident of Milwaukee, Wisconsin.

Corbin D. Hughes was appointed administrator of his son's estate by the County Court of Milwaukee County, Wisconsin, and commenced this action for wrongful death based on the Illinois Wrongful Death Statute, Sections 1 and 2 of Chapter 70, Smith-Hurd Illinois Annotated Statutes. The applicable Illinois statute is set forth in Appendix C.

The defendants denied negligence; later the defendants moved for summary judgment in the Circuit Court of Milwaukee County upon the sole contention that an action could not be maintained in Wisconsin for a wrongful death caused in Illinois because of the provision of Section 331.03 of the Wisconsin Statutes.

Plaintiff contended in the trial court that this action was not brought under the Wisconsin Wrongful Death Act but was brought under the Illinois Statute, and that the proviso found in Section 331.03 of the Wisconsin Statutes did not prohibit the bringing of this action. The trial court sustained defendants' position and granted defendants summary judgment and dismissed the plaintiff's complaint on the merits.

The Supreme Court of the State of Wisconsin (two justices dissenting) construed the Wisconsin statute to prohibit access to its courts in enforcing an action for wrongful death based upon the statutes of Illinois, and affirmed the judgment of the trial court, summarily dismissing the plaintiff's complaint on the merits.

The Questions Are Substantial

Both the Circuit Court and the Supreme Court of Wisconsin in its decision dated May 2, 1950, considered the question whether Section 331.03 violates the Federal Constitution in denying enforcement in Wisconsin of a cause of action for wrongful death conferred by a statute of the

State where death was caused. Both opinions relied heavily on *Doughterty* v. *McKenna Process Co.*, 255 Ill. 369, 99 N. E. 619; and the two United States Supreme Court cases there quoted, namely, *Paul* v. *Virginia*, 8 Wall. 168, 19 L. Ed. 357, and *Chambers* v. *Baltimore & Ohio Railroad Co.*, 207 U. S. 142; 28 Sup. Ct. 34; 52 L. Ed. 143.

A line of decisions of the United States Supreme Court, much more recent than *Paul* v. *Virginia* or *Chambers* v. *Baltimore & Ohio Railroad Co.*, holds that the Full Faith and Credit Clause would require Wisconsin to open the doors of its courts and permit enforcement of the wrongful death statute of a sister State because a statute is a "public act" within the meaning of the full faith and credit provision of the United States Constitution; *Bradford Electric Light Co.* v. *Clapper*, 286 U. S. 145, 155; 76 L. Ed. 1026, 1032; 56 Sup. Ct. 571; 82 A. L. R. 696.

In *Broderick* v. *Rosner*, 294 U. S. 629; 79 L. Ed. 1100; 56 Sup. Ct. 489; 100 A. L. R. 1133, 1140, footnote 3, it is pointed out that the *Chambers* case did not consider the Full Faith and Credit Clause.

The language of *Broderick* v. *Rosner*, *Pink* v. *A. A. A. Highway Express, Inc.*, 314 U. S. 201, 210; 86 L. Ed. 152, 158; *Angel* v. *Bullington*, 330 U. S. 183; 67 Sup. Ct. 657; 91 L. Ed. 832, shows that both Full Faith and Credit and Due Process clauses forbid a state to deny access to its courts solely because the cause of action asserted is based on the law of a sister state rather than that of the forum.

Wisconsin statute, Section 331.03, is an enactment of the principle of Lord Campbell's Act, and has existed in its present form since 1857. Wisconsin Session Laws 1857, Ch. 71, Sec. 1. Prior to the decision herein appealed from, Wisconsin uniformly had enforced the wrongful death statutes of other states. *Bain* v. *Northern Pacific Rail-*

road Co. (1904), 120 Wis. 412; 98 N. W. 241; *Bernard* v. *Jennings* (1932), 209 Wis. 116; 244 N. W. 589; *Sheehan* v. *Lewis* (1935), 218 Wis. 588; 260 N. W. 633. Section 331.03 of the Wisconsin Statutes created a right of action for wrongful death caused within the State of Wisconsin. The language of the statute limiting its application to deaths caused within Wisconsin has now—for the first time in the ninety years since its enactment—been construed by the Supreme Court of Wisconsin as a legislative mandate to refuse recognition and enforcement to the wrongful death statute of any other state, unqualified by any circumstances such as that the death-causing tort feasor has fled the *locus delicti* and may be amenable to process only in Wisconsin.

No question of a state's "public policy," in the ordinary sense, is involved. It is recognized that if the state of the forum condemns the moral quality of a transaction which occurred beyond its borders, the forum may constitutionally refuse to sanction or fructify it just as if the transaction had occurred within its borders. (See *Restatement, Conflict of Laws,* Section 612, pp. 731-732) No such question is involved here. Wisconsin has no public policy opposed to collection of damages for wrongful death as such. On the contrary Wisconsin was one of the first states to adopt, and has retained by Section 331.03, the principle of Lord Campbell's Act as to death caused within the state.

Wisconsin's refusal to allow its courts to entertain actions brought under the Wrongful Death Statute of a sister state is therefore one of refusal to enforce a transitory right or cause of action solely because that right arose outside its borders under the laws of another state.

II

The vice of the decision of the Supreme Court of Wisconsin is that it absolutely nullifies the Full Faith and Credit provision of the United States Constitution.

The present case involves a statute of Wisconsin construed as denying access to its courts for the enforcement of an action for damages for wrongful death caused in any other state.

The tremendous volume of interstate travel by automobile, and the incidence of frequently fatal injury therein, make the question of the validity of Wisconsin's denial one of general and practical importance: May a state where the tort feasor lives or is served with process refuse access to its courts for enforcement of rights conferred by the statutes of the state where the wrongful death was caused?

But the principle of constitutional law involved affects not only actions for wrongful death. If a state may close its doors to such actions (to enforce rights conferred by the statutes of a sister state) it may deny access to its courts to obtain redress for any kind of injury caused by any kind of tort—whether to person or property—simply because the wrongful act was committed outside its borders, and because the remedy therefor is conferred not by the laws of the forum but of a sister state. If the Federal constitution does not forbid a state to refuse enforcement of transitory causes of action for tort committed elsewhere, why may not a state refuse to enforce any rights acquired under contract made in another state and pursuant to the laws of that other state?

It is not suggested that Wisconsin or any other state would go so far as to attempt to isolate itself from the rest of the Union by disclaiming interest in the protection of any and all rights orginating in acts or transactions occurring

outside its borders. But may any state, as to *any* act occurring outside its borders, and therefor governed by the law of another state, refuse to enforce that law, which is the same or substantially the same as the forum applies to acts occurring within its borders?

It is submitted that, in the absence of any difference in judgment ("public policy") between the law of the forum and the law of the State where the act or transaction took place as to its moral quality (none exists between the statute of Wisconsin and the statute of Illinois here involved) every state is required to give full faith to the rights created by the statutes of every other state when invoked in the forum; that, with respect to the laws of the sister state involving no conflict in substantive law with the law of the forum, no state is free to disclaim responsibility for enforcing the laws of such sister state; and that Section 1 of Article IV and Section 1, Fourteenth Amendment, United States Constitution, require the striking down of any state statute which directs its courts to close their doors to, or refuse to recognize and enforce therein, the statute of a sister state with relation to acts done in that sister state, especially while enforcing a similar statute with relation to similar acts done within the state of the forum.

III

Justice Cardozo, speaking for the New York Court of Appeals, held that a right of action for wrongful death given by a sister state, where the wrongful death occurred, is a property right. (See *Loucks* v. *Standard Oil Co.*, 224 N. Y. 99; 120 N. E. 198.)

Wisconsin should enforce property rights acquired in other states. To refuse to enforce in Wisconsin a property right acquired in another state is to leave the plaintiff

without a remedy and takes away his property without due process of law.

It is submitted that Section 331.03 of the Wisconsin Statutes, as construed by the Supreme Court of the state of Wisconsin, fails to give full faith and credit to the public acts of a sister State in violation of Section 1, Article IV, United States Constitution. Wisconsin, in denying access to its courts in enforcing a property right that the plaintiff acquired under the laws of Illinois, is, in effect, taking away the plaintiff's property without due process of law in violation of Section 1 of the Fourteenth Amendment of the United States Constitution.

Respectfully submitted,

SAMUEL GOLDENBERG,
Counsel for Plaintiff-Appellant.

APPENDIX "A"

STATE OF WISCONSIN: IN SUPREME COURT

AUGUST TERM, 1949

No. 187

CORBIN D. HUGHES, Adm'r. of the Estate of Harold G. Hughes, *Appellant*,

v.

GLENN C. FETTER, et al., *Respondents*

Appeal from judgment of the Circuit Court for Milwaukee County, Charles L. Aarons, Circuit Judge. Affirmed.

Corbin D. Hughes, Administrator of the estate of Harold G. Hughes, brought this action against Glenn C. Fetter and Farmer Mutual Automobile Insurance Company, a Wisconsin corporation, to recover damages for wrongful death based on the Illinois wrongful death statute, sections 1 and 20, Chapter 70, Smith-Hurd Illinois Annotated Statutes. The action was begun July 7, 1948. Defendant moved for summary judgment, and judgment was directed dismissing the plaintiff's complaint on the merits. November 25, 1949. Plaintiff appealed.

Judge Aarons, who heard the matter, states the problem as follows:

"Defendants' motion for summary judgment is grounded upon the proposition that the death of Harold G. Hughes (which occurred in Illinois on January 11, 1948), is alleged to have been caused by negligent conduct of the defendant in operating an automobile (in which Harold G. Hughes was a passenger) in Effingham county, in the State of Illinois, on January 8, 1948. Defendants contended that the action is not one 'brought for a death caused in this State' and is therefore not maintainable by reason of a proviso contained in section 331.03 Wis. Stats. It appears to be conceded

that both Hughes, the decedent, and the defendant Fetter were Wisconsin residents at the time of the accident and that said defendant still resides in this state.

"The plaintiff administrator (who was appointed by the County Court of Milwaukee County) predicates his cause of action on the Illinois death statute."

FAIRCHILD, J. The Wisconsin statute, section 331.03 which the learned trial judge ruled prevented the maintenance of the action and required a dismissal of the complaint does permit recovery for death by wrongful act. But it also contains the provision "that such action shall be brought for a death caused in this state." The question is now raised whether for a death in Illinois this action can be maintained in Wisconsin notwithstanding that provision in our statute.

The right to recover for death by wrongful act is purely statutory. The words of the statute, "provided that such action shall be brought for a death caused in this state" seem plain enough to bar cases not within its terms, and to exclude actions where the wrongful act resulting in death occurred in another state. This must be so, unless that provision is unconstitutional, or unless the rules of comity placed an obligation upon the courts of this state to voluntarily try a case arising under the Illinois wrongful death statute.

First, with respect to the constitutionality of the provision: We agree with the learned trial judge that the enactment is not in contravention of the full faith and credit clause of the Federal Constitution or of paragraph 1, section 2 of Article IV providing that the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states. It has been repeatedly declared to be the law that it was not intended by the provisions of the Federal Constitution referred to to give to the laws of one state any operation in other states except by permission, express or implied, by those states. *Paul* v. *Virginia*, 8 Wall. 168, 19 L. Ed. 357. The rule applies with full force to statutes giving a right of action for death by the wrongful act of another.

The policy of Wisconsin against the maintenance of such an action having been created positively in a statute, that policy must prevail. "Different states may have different policies, and the same state may have different policies at different times, provided that any policy the state may choose to adopt must operate the same way on its own citizens and those of other states." *Chambers* v. *Baltimore & Ohio Railroad Co.*, 207 U. S. 142, 28 Sup. Ct. 34, 52 L. Ed. 143. In the case of *Dougherty* v. *American McKenna Process Co.*, 255 Ill. 369, 99 N. E. 619, L.R.A. 1915 F. 955, the Illinois court, in commenting on the Ohio decision, said: "The reason of that decision as to the right of a State to exclude actions of the kind here in question fully sustains the validity under the Federal Constitution of the provision of the injuries act above referred to. . . . It necessarily follows that the trial court rightly held that the courts of this state are without jurisdiction to entertain this cause of action, and the judgment of that court will be affirmed."

The learned trial judge in the case at bar said that "the views of the Illinois court authoritatively supported by the U. S. Supreme Court (*Chambers* case, *supra*) and many other cases cited in the opinion (in *Dougherty* v. *American McKenna Process Co.*, *supra*) also received sanction in a number of Wisconsin cases although the precise question raised in the instant case has not been passed upon in this state. . . . *Finney* v. *Guy*, 106 Wis. 256 (Syl. 3), 276, 277, 49 L. R. A. 486 (affirmed by U. S. Supreme Court, 189 U. S. 335, 47 L. Ed. 839; *Robertson* v. *Chicago etc. R. Co.*, 122 Wis. 66, 72 (citing and discussing *Texas & P. R. Co.* v. *Cox*, 145 U. S. 593, 604-606, 37 L. Ed. 829, 833); *Bain* v. *Northern Pacific R. Co.*, 120 Wis. 412, 418, 419; *Fox* v. *Postal Telegraph-Cable Co.*, 138 Wis. 648, 652, 653; *Presbyterian Ministers' Fund* v. *Thomas*, 126 Wis. 281, 285; *International Harvester Co.* v. *McAdam*, 142 Wis. 114, 121; *Bartlett* v. *Collins*, 109 Wis. 477, 482; *Porte* v. *C. & N. W. R. Co.*, 162 Wis. 446, 451.

Now as to the matter of comity: In this state the courts will generally enforce the law of the place where the injury occurred, unless to do so is contrary to the law,

morals or policy of the state where the action is sought to be maintained. However, if the policy of the forum has been expressed positively in a statute, that policy must prevail. "When the legislature speaks upon a subject upon which it has constitutional power to legislate, public policy is what the statute indicates." *Harding* v. *American Glucose Co.*, 182 Ill. 551, *People* v. *Shedd*, 241 Ill. 155; *Ziegler* v. *Illinois Trust and Savings Co.*, 245 Ill. 180; *Miner on Conflict of Laws*, section 6, page 10. By virtue of the doctrine of comity, rights acquired under statute enacted or judgment rendered in one state will be given force and effect in another, unless, as said, against policy or laws of the state, prejudicial to interests of its citizens or against good morals and natural justice; comity being a rule of practice, however, and not a rule of law. *In re Chase*, 141 S.E. 471, 473, 195 N.C. 143. The doctrine of comity results in recognition of a decree of a different state not entitled to full faith and credit. It is neither a matter of absolute obligation nor of mere courtesy and good will, but is recognition which one state allows within its territory to legislative, executive or judicial acts of another, having due regard to duty and convenience and to rights of its own citizens. *11 Amer. Jur., section* 183, page 495, *Corpus Juris Secundum*, Vol. 15, page 245, *Strawn Mercantile Co.* v. *First Nat. Bank, Tex.*, 279 S.W. 473, 474; *Baker River & S. R. Co.* v. *Nichols*, 99 P. 876, 877, 51 Wash. 619.

Plaintiff in support of his position here urges the doctrine that all legislation is *prima facie* territorial and does not operate beyond the jurisdiction in which it is enacted. He cites *Bernard* v. *Jennings*, 209 Wis. 116, 120. The distinction between the facts of that case and the instant one is obvious. The learned trial judge, because of the stress placed upon the matter of extraterritorial legislation, thought it appropriate to point out that as to the Wisconsin statute there is no valid ground for asserting that the proviso in question is intended to have force in other states. It has force, however, whenever within its own boundaries claims are asserted. As to the Illinois statute, he said: "In so far as its enforcement would operate to defeat the Wisconsin statutory provision it can have no force or effect in

this state; otherwise the Illinois statute would be given extraterritorial force."

Plaintiff's counsel directs attention to the case of *Sheehan* v. *Lewis*, 218 Wis. 588, and other Wisconsin cases where actions for wrongful death—although caused in other states—were maintained in this state after the enactment of our statute. It appears that in those cases the particular point involved and here considered was not advanced. Those cases, therefore, cannot be considered as authoritative upon the question here presented. They did not change the statute. In the *Sheehan case, supra,* it appeared that Illinois, where the injury causing death occurred, then had the same statute which has been referred to in this case, prohibiting actions in that state to recover damages for death occurring outside of the state. In that case a doctrine of reciprocity was contended for by the defendant to bar the action in Wisconsin, since Illinois under its statute would have barred an action in that state for a death occurring in this state. Our court in disagreeing with that contention quoted the Illinois statutory provision and added these words: "Wisconsin has no such statute." There was then quoted the first paragraph of section 2 of Article IV, U. S. Constitution, and we added: "Citizens of other states have the same right to sue in the courts of Wisconsin that citizens of Wisconsin have." *Sheehan* v. *Lewis, supra,* p. 593. It is apparent that the full contents of section 331.03 was not given due consideration. And it is evident that the decisions resulted from circumstances similar to those referred to in *Kelso Company* v. *Ellis*, 224 N. Y. 528, 537, where Judge Pound said: "Even in this court a dictum in *Bank of America* v. *Waydell* (187 N. Y. 115, 120) reveals the habit of bench and bar to look to cases rather than statutes . . . until attention is sharply directed" to the existence of a policy fixing statute.

The only case brought to the attention of our court dealing directly with the proviso contained in section 331.03 Wis. Stats. is *Rudiger* v. *Chicago, et R. Co.*, 94 Wis. 191. The point determined in that case was that even though the death occurred in another state, action should be maintained

in the Wisconsin courts, if the death was caused in this state; and we held that the "object and the effect of the proviso in our statute was to render the action local and limit it to cases where death was caused by actions committed or occurring within this state, without regard to whether the death occurred within or without it."

The suggestion that the doctrine of *stare decisis* ought to control our decision upon the matter here involved is without weight. *Reiter* v. *Grober*, 173 Wis. 493. We do not find that a rule of property was involved, nor do we find any basis existing for the court to review the conclusion reached by the legislature. Its findings are not, under the circumstances, subject to judicial review. Therefore in deference to the determination of the legislature and the plain requirements of its acts, any statements made in our opinions in cases heretofore treating with a similar situation which are contrary to the opinion here expressed are withdrawn. As pointed out in the opinion of the learned trial judge, the precise point relating to the statute was not considered in the Wisconsin cases relied upon by the plaintiff.

The statute in another state cannot be made the basis of furnishing a remedy for action in Wisconsin whose maintenance would be wholly inconsistent with the public policy of our state as declared by the legislature. To hold that this action could be maintained notwithstanding that death was not caused in this state would be to override such public policy as declared by statute and would operate to deprive the proviso of purpose or meaning. The plaintiff seeks the benefit of a remedy denied him by the law of the forum. *Estate of Seybold*, 223 Wis. 192. As is shown by the above cited cases, the conclusion here reached is not only in accordance with the ruling of the U. S. Supreme Court and the Wisconsin Supreme Court, but it is the law in the very state, Illinois, under whose wrongful death act the instant action is alleged to have been commenced. *Dougherty* v. *McKenna Process Co., supra.*

The defendants' motion for summary judgment dismissing the plaintiff's complaint was properly granted.

By the Court: Judgment affirmed.

APPENDIX "A-1"

(copy)

STATE OF WISCONSIN, CIRCUIT COURT, MILWAUKEE COUNTY

No. 215-551

CORBIN D. HUGHES, Administrator of the Estate of Harold G. Hughes, *Plaintiff*,

v.

GLENN C. FETTER and FARMERS MUTUAL AUTOMOBILE INSURANCE COMPANY, a Wisconsin corporation, *Defendants*

October 28, 1949.

Hon. Chas. L. Aarons, Judge

Decision on Defendants' Motion for Summary Judgment

The action is one to recover damages because of the death of Harold G. Hughes by the wrongful act of the defendant Fetter. The defendants have moved for a summary judgment. At the time of the oral argument upon such motion the plaintiff presented a motion to amend his complaint by incorporating certain Illinois statutes governing actions for damages for death by wrongful act; and bearing upon liability and upon the duties of operators of motor vehicles. Such proposed amendment may be considered as allowed.

Defendants' motion for a summary judgment is grounded upon the proposition that the death of Harold G. Hughes (which occurred in Illinois on January 11, 1948) is alleged to have been caused by negligent conduct of the defendant in operating an automobile (in which Harold G. Hughes was a passenger) in Effingham County in the State of Illinois on January 9, 1948. Defendants contend that the action is not one "brought for a death caused in this state" and

is therefore not maintainable by reason of the proviso contained in section 331.03, Wis. Stats. It appears to be conceded that both Hughes (the decedent) and the defendant Fetter were Wisconsin residents at the time of the accident; and that said defendant still resides in this state.

The plaintiff administrator (who was appointed by the County Court of Milwaukee County) predicates his cause of action upon the Illinois death statute. A copy of that statute is contained in Exhibit "A" attached to plaintiff's affidavit in opposition to the motion for summary judgment. A copy is also appended hereto (see page 11).

The Wisconsin statute on the subject is section 331.03 (Stats. 1947). It reads as follows:

> "331.03 *Recovery for death by wrongful act.* Whenever the death of a person shall be caused by a wrongful act, neglect or default and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who, or the corporation which, would have been liable, if death had not ensued, shall be liable to an action for damages notwithstanding the death of the person injured; *provided, that such action shall be brought for a death caused in this state.*" (Emphasis added)

The sole question presented is whether the instant action is maintainable notwithstanding the above quoted proviso.

Plaintiff contends that the Wisconsin statute is inapplicable since he alleges that he brings his action under the Illinois Wrongful Death Statute. He cites section 391 of the Restatement on Conflict of Laws to the effect that

> "The law of the place of wrong governs the right of action for death";

and section 392:

> "Action for the death of a person will be allowed in any state on a right of action created by the law of

the place of wrong, if the right of action is given to compensate a person or persons injured by the death for the loss caused thereby."

The Wisconsin annotations supplementing these sections indicate that Wisconsin cases are in accord with the Restatement rule on the subject.

The rule referred to is, however, not in all cases a matter of strict right. It will be so regarded where the right to sue is, under the applicable facts, protected by the "full faith and credit" clause (Sec. 1 of Art. IV) or by Sec. 2 of Art. IV of the U. S. Constitution (the latter section declaring that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states"). Where such constitutional sanctions are not involved the principles of comity govern.

> "By the rules of comity, the courts of one state will voluntarily enforce the laws of a friendly state or nation when, by such enforcement, they will not violate their own public policy or laws or injuriously affect the interests of their own state or of their own citizens." *Disconto Gesellschaft* v. *Umbreit*, 127 Wis. 651, 658 to 660.

By reason of the restricting effect of the proviso in Section 331.03, Wis. stats., the situation here presented is governed by the following rule which in the language of the Restatement of Conflict of Laws, reads as follows:

> "§ 612. *Action Contrary to Public Policy.* No action can be maintained upon a cause of action created in another state the enforcement of which is contrary to the strong public policy of the forum."

See also the substituted Comment (a) to said Section 612 (Conflict of Laws) as contained in the 1948 supplement of the Restatement (p. 175).

Upon an examination of a large number of the decisions bearing upon the subject here considered the court is of the opinion that the principles which prevail in Wisconsin as

well as in Illinois are accurately stated in the following quoted paragraph from Vol. 11 *American Jurisprudence* at page 495:

> "§ 183. *Actions Contravening Public Policy.*—It is conceded by all the courts that it is not strict right, but comity, which enables one to bring an action in one state or country for a tort, such as negligent death or bodily injuries, caused in another, and that under the principles of comity, such action will not be entertained if it would violate the public policy of the forum. Thus, a state may refuse the maintenance of an action on a tort arising elsewhere. A statute forbidding the maintenance within the state of actions brought on injury statutes of other states does not contravene a provision of the Federal Constitution requiring each state to give full faith and credit to the public acts, records, and judicial proceedings of every other state. Moreover, forbidding the maintenance within the state of actions for personal injuries arising outside the state does not contravene a constitutional provision that every person ought to find a remedy in the law for all injuries and wrongs that he may receive in his person, property, or reputation."

See also the discussion of "*Comity*" in the same work, *11 Am. Jur.*, pages 296-306.

One of the cases referred to in § 183 (above quoted) is *Doughterty v. American McKenna Process Co.*, 255 Ill. 369, 99 N. E. 619, L. R. A. 1915 F. p. 955. The case presents a close parallel to the instant situation—the only difference being in the phrasing of the Illinois statutory proviso having reference to actions for damages for wrongful death.

In the *Doughterty* case the deceased—a citizen and resident of Illinois—was injured while in the employ of the defendant at Elizabeth, New Jersey and died in the latter state from the effect of his injury. The action was commenced in Illinois by the administrator of the deceased who was appointed by an Illinois Probate Court. The action was however alleged to be based upon a pleaded statute of New

Jersey. Section 2 of the Injuries Act of Illinois provided that

> "No action shall be brought or prosecuted in this state to recover damages for a death occurring outside of this state."

The trial court sustained a general demurrer to the complaint because of said proviso in the Illinois Injuries Act. Upon an appeal to the Illinois Supreme Court the plaintiff contended that the statutory provision referred to

> "does not prevent the bringing of an action in this state (Illinois) for death caused by wrongful act in another state, provided it is brought on the statute of such other state and not on the statute of Illinois; that, if this is not the proper construction of the statute above quoted, then such statute is unconstitutional" (99 N. E. page 620).

The court refused to assent to either of said contentions. Quoting (in part) from the opinion of the court (Id. 620, 621):

> "At common law no right of action existed for the recovery of damages for injury resulting in the death of a person caused by another's wrongful act. Such a right of action is statutory. • • • The acts of the Legislature of a state can have, in themselves, no extra-territorial effect. To put the interpretation upon this section now contended for by counsel would practically render it meaningless • • •.
>
> A further contention of counsel is that if this statute applies to actions brought here, based upon the statute of another state, then it is in contravention of section 1 of article 4 of the United States Constitution, which provides that 'full faith and credit shall be given, in each state, to the public acts, records and judicial proceedings of every other state,' and also of paragraph 1 of section 2 of said article, which provides that 'the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.' • • •

It was not intended by the provisions of the federal Constitution relied on by counsel to give to the laws of one state any operation in other states except by a permission, express or implied, by those states. *Baul v. Virginia*, 8 Wall. 168, 19 L. Ed. 357. * * * *This rule applies with full force to statutes giving a right of action for death by the wrongful act of another. If they are administered outside of the state where they are enacted, it is only on the principles of comity.* In this country the courts will generally enforce the law of the place where the injury occurred, unless to do so is contrary to the law, morals, or policy of the forum. (Citing) * * * *If the policy of the forum has been expressed positively in a statute, that policy must prevail.* When the Legislature speaks upon a subject upon which it has constitutional power to legislate, *public policy is what the statute* indicates. (Citing) * * * Each state, subject to restrictions of the federal Constitution, determines the limits of the jurisdiction of its courts, the character of the controversies which shall be heard in them, and how far its courts having jurisdiction of the parties shall hear and decide transitory actions where the cause of action has arisen outside of the state. (Citing) * * * Different states may have different policies, and the same state may have different policies at different times, provided that any policy the state may choose to adopt must *operate the same way on its own citizens and those of other states. Chambers v. Baltimore & Ohio Railroad Co.*, 207 U. S. 142, 28 Sup. Ct. 34, 52 L. Ed. 143. In this last case it was held that a statute of Ohio providing that no action could be maintained in that state for wrongful death occurring in another state, except where the deceased was a citizen of Ohio, did not violate the federal Constitution. A dissenting opinion, joined in by three members of the court, in effect conceded that *had the Ohio court excluded from the courts of that state all actions for personal injuries arising in other states it would have been constitutional.* The reasoning of that decision as to the right of a state to exclude actions

of the kind here in question fully sustains the validity, under the federal Constitution, of the provision of the Injuries Act above referred to. * * * (Id. p. 621)

It necessarily follows that the trial court rightly held that the courts of this state were without jurisdiction to entertain this cause of action, and the judgment of that court will be affirmed." (Italics added.)

The above quoted views of the Illinois court authoritatively supported by the U. S. Supreme Court (*Chambers case, supra*) and many other cases cited in the opinion (omitted in the above quotation) also receive sanction in a number of Wisconsin cases although the precise question raised in the instant case has not been passed upon in this state so far as known to the writer. *Finney v. Guy*, 106 Wis. 256 (Syl. 3), 276, 277, 49 L. R. A. 486 (affirmed by U. S. Supreme Court, 189 U. S. 335, 47 L. Ed. 839); *Robertson v. Chicago, etc., R. Co.*, 122 Wis. 66, 72 (citing and discussing *Texas & P. R. Co. v. Cox*, 145 U. S. 593, 604-606, 36 L. Ed. 829, 833); *Bain v. Northern Pacific R. Co.*, 120 Wis. 412, 418, 419; *Fox v. Postal Telegraph-Cable Co.*, 138 Wis. 648, 652, 653; *Presbyterian Ministers' Fund v. Thomas*, 126 Wis. 281, 285; *International Harvester Co.* v. *McAdam*, 142 Wis. 114, 121; *Bartlett v. Collins*, 109 Wis. 477, 482; *Porte v. C. & N. W. R. Co.*, 162 Wis. 446, 451.

It should be noted that the constitutional provision contained in Sec. 2 of Art. IV of U. S. Constitution is applicable in the event there should be any attempted impairment of the right of a citizen of another state to exercise the same right to sue in the courts of Wisconsin *that citizens of Wisconsin* have. *Eingartner v. The Illinois Steel Co.*, 94 Wis. 70; *State ex rel Smith v. Belden*, 205 Wis. 158, 161, 162; *Chambers v. Baltimore & Ohio R. Co.*, 207 U. S. 142, 52 L. Ed 143, 146 and 147; *Paul v. Virginia*, 8 Wall. 168, 19 L. Ed. 357, 360 (where *Mr. Justice Field* says:

"It was undoubtedly the object of the clause in question to place the citizens of each state upon the same footing with citizens of other states, so far as advantages resulting from citizenship in those states are concerned.")

While the language of the proviso in the Illinois statute as quoted in the *Dougherty Case, ante* p. 5, is framed in the negative terms, and also has reference to the state where the death occurred, instead of—as in Wisconsin—to the state where the death was caused, it is not perceived that there is any substantial difference in the effect of the two statutes.

It should be noted not only that both the decedent in the instant case and the defendant were citizens of Wisconsin but that irrespective of such fact there is nothing in the Wisconsin Act (Sec. 331.03) which imposes restrictions upon non-residents which are not likewise imposed upon residents of the state of Wisconsin.

The plaintiff's position in denying the applicability of the Wisconsin statute is also asserted to be based upon the doctrine that "all legislation is *prima facie* territorial and it does not operate beyond the limits of the jurisdiction in which it is enacted." *Bernard v. Jennings*, 209 Wis. 116, 120 (cited in plaintiff's brief). The distinction between the facts of that case and the instant one is obvious and requires no discussion. However, as considerable stress has been placed upon the matter of extraterritorial legislation it may be appropriate to point out

(1) *As to the Wisconsin Statute:* There is no valid ground for asserting that the proviso in question is intended to have force in other states. It has force however whenever *within its own boundaries* claims are asserted which are in contravention of its provision.

(2) *As to the Illinois Statute:* In so far as the enforcement would operate to defeat the Wisconsin statutory provision it can have no force or effect in this state. Otherwise the Illinois statute would be given extraterritorial force.

Plaintiff's counsel directs attention to *Sheehan v. Lewis*, 218 Wis. 588, and other Wisconsin cases where actions for wrongful death—although caused in other states—were maintained in this state. It appears that in those cases the issues involved and considered did not include the specific question here raised. Those cases, therefore, cannot be considered as authoritative upon the question here presented.

In the *Sheehan Case* it appeared that Illinois—where the injury causing death occurred—had a statute prohibiting actions in that state to recover damages for death occurring outside of the state. A doctrine of reciprocity was contended for by the defendant in that case to bar the Wisconsin action, since Illinois under its statutes would have barred an action in that state for a death occurring outside of that state. Our court in disagreeing with that contention quoted the Illinois statutory provision and added: "Wisconsin has no such statute." The court quoted the first paragraph of Sec. 2 of Art. IV, U. S. Constitution, and added: "Citizens of other states have the same right to sue in the courts of Wisconsin that citizens of Wisconsin have." (218 Wis. at page 593). It is apparent that the fact was overlooked that Sec. 331.03 then—as at present—contained the proviso under which an action for damages for death by wrongful act could be maintained only if such action is brought "for a death caused in this state." As above indicated the proviso in order to have any force or effect possesses the same meaning as the negative form appearing in the Illinois statute.

The only case brought to the attention of the court dealing directly with the proviso contained in section 331.03 (then known as section 4255) is *Budiger v. Chicago etc. R. Co.*, 94 Wis. 191. The point determined in that case was that even though the death occurred in another state, action could be maintained in the Wisconsin courts if the death was *caused in* this state. *Id.* 192, 194, 195. The court said:

> "The object and effect of the proviso to our statute was to render the action local, and limit it to cases where death was caused by acts committed or occurring within the state, without regard to whether the death occurred within or without it." *Id.* 195, 196.

Conclusion

The words "provided that such action shall be brought for a death caused in this state" appearing at the end of the Wisconsin statute (Sec. 330.03) necessarily mean that the right to bring actions for wrongful death (a right non-

existent at common law, *Schwab v. Nelson*, 249 Wis. 563, 565) is granted *only* in cases where the death was caused in this state. It therefore necessarily excludes cases where the death was caused in other states. The statute of another state cannot be made the basis of an action in Wisconsin whose maintenance would be wholly inconsistent with the declared public policy of our legislature. To hold that this action could be maintained notwithstanding the fact that the death was not caused in this state would be to override such public policy as declared by statute; and would operate to deprive the proviso of purpose or meaning. As is shown by the above cited cases the conclusion here reached is not only in accordance with the rule of the U. S. Supreme Court and the Wisconsin Supreme Court but it is the law in the very state (Illinois) under whose wrongful death act the instant action is alleged to have been commenced (*Dougherty Case, ante*, pp. 5-7).

For the reasons stated the defendant's motion for a summary judgment dismissing the complaint must be granted.

(S.) Chas. L. Aarons, Circuit Judge.

Dated at Milwaukee, Wisconsin, this 28th day of October, 1949.

"Exhibit 'A'

Smith and Hurd Illinois Annotated Statutes:

'Sec. 1. Whenever the death of a person shall be caused by the wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who or company or corporation which would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony.

Sec. 2. Action—by whom brought—limit of damages—death outside state. Every such action shall be brought by and in the names of the personal representative of such

deceased person, and the amount recovered in every such action shall be for the exclusive benefit of the widow and next of kin of such deceased person, and shall be distributed to such widow and next of kin in the proportion provided by law in relation to the distribution of personal property left by persons dying intestate and in every such action the jury may give such damages as they shall deem a fair and just compensation with reference to the pecuniary injuries resulting from such death, to the wife and next of kin of such deceased person, not exceeding the sum of $15,000. Provided that every such action shall be commenced within one year after the death of such person. Provided further, that no action shall be brought or prosecuted in this state to recover damages for death occurring outside of this state where a right of action for such death exists under the laws of the place where such death occurred and service of process in such suit may be had upon the defendant in such place.'"

APPENDIX "B"

Section 331.03, Wisconsin Statutes:

"Recovery for death by wrongful act. Whenever the death of a person shall be caused by a wrongful act, neglect or default and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who, or the corporation which, would have been liable, if death had not ensued, shall be liable to an action for damages notwithstanding the death of the person injured; provided, that such action shall be brought for a death caused in this state."

APPENDIX "C"

Illinois Revised Statutes, Chapter 70:

"WRONGFUL DEATH

"AN ACT requiring compensation for causing death by wrongful act, neglect or default. (Approved February 12, 1853. L. 1853, p. 97)

"1. Killing—Action survives) Sec. 1. Be it enacted by the People of the State of Illinois, represented in the General Assembly: Whenever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who or company or corporation which would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony.

"2. Action—By whom brought—Limit of damages—Death outside State.) Sec. 2. Every such action shall be brought by and in the names of the personal representatives of such deceased person, and the amount recovered in every such action shall be for the exclusive benefit of the widow and next of kin of such deceased person, and shall be distributed to such widow and next of kin in the proportion provided by law in relation to the distribution of personal property left by persons dying intestate and in every such action the injury may give such damages as they shall deem a fair and just compensation with reference to the pecuniary injuries resulting from such death, to the wife and next of kin of such deceased person, not exceeding the sum of $15,000: Provided, that every such action shall be commenced within one year after the death of such person.

Provided, further, that no action shall be brought or prosecuted in this State to recover damages for a death occurring outside of this State where a right of action for such death exists under the laws of the place where such death occurred and service of process in such suit may be had upon the defendant in such place. As amended by act approved July 18, 1947."

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 355

CORBIN D. HUGHES, ADMINISTRATOR OF THE ESTATE OF HAROLD G. HUGHES,

Plaintiff and Appellant,

vs.

GLENN C. FETTER and FARMERS MUTUAL AUTOMOBILE INSURANCE COMPANY, A WISCONSIN CORPORATION,

Defendants and Respondents.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN

BRIEF OF APPELLANT

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II

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 355

CORBIN D. HUGHES, ADMINISTRATOR OF THE ESTATE OF HAROLD G. HUGHES,

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Defendants and Respondents.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN

Opinion Below

The opinion of the Supreme Court of the State of Wisconsin is reported in *Hughes vs. Fetter et al*, 257 Wis. 35; 42 N.W. 2d 452.

Jurisdiction

The jurisdiction of the Supreme Court of the United States to review this decision by direct appeal is conferred by Title 28, United States Code, Section 1257.

Question Presented

May a state consistently with the Full Faith and Credit Clause, Section 1, Article IV, United States Constitution,

and the Due Process Clause, Section 1, Fourteenth Amendment, United States Constitution, forbid access to its courts to enforce a cause of action for a wrongful death based upon the statutes of a sister state, where the injuries and death occurred in that other state?

Statute Involved

Section 331.03 of the Revised Statutes of the State of Wisconsin reads as follows:

> "Recovery for death by wrongul act. Whenever the death of a person shall be caused by a wrongful act, neglect or default and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who, or the corporation which, would have been liable, if death had not ensued, shall be liable to an action for damages notwithstanding the death of the person injured; provided, that such action shall be brought for a death caused in this state.

Statement of Facts

Harold G. Hughes, a minor, a resident of Milwaukee, Wisconsin, died on January 11, 1948, in Effingham, Illinois, as the result of injuries sustained in a collision in Effingham County, Illinois, on January 9, 1948. Decedent Hughes was riding as a passenger in the car of the defendant Fetter at the time of the accident.

The driver of the car, Glenn C. Fetter, was also a resident of Milwaukee, Wisconsin.

Corbin D. Hughes was appointed administrator of his son's estate by the County Court of Milwaukee County, Wisconsin, and commenced this action for wrongful death based on the Illinois Wrongful Death Statute, Sections 1

and 2 of Chapter 70, Smith-Hurd Illinois Annotated Statutes. Said Illinois statute provided as follows:

"WRONGFUL DEATH

"An Act requiring compensation for causing death by wrongful act, neglect or default. (Approved February 12, 1853. L. 1853, p. 97)

"1. Killing—Action survives) Sec. 1. Be it enacted by the People of the State of Illinois, represented in the General Assembly; Whenever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who or company or corporation which would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony.

"2. Action—By whom brought—Limit of damages—Death outside State.) Sec. 2. Every such action shall be brought by and in the names of the personal representatives of such deceased person, and the amount recovered in every such action shall be for the exclusive benefit of the widow and next of kin of such deceased person, and shall be distributed to such widow and next of kin in the proportion provided by law in relation to the distribution of personal property left by persons dying intestate and in every such action the injury may give such damages as they shall deem a fair and just compensation with reference to the pecuniary injuries resulting from such death, to the wife and next of kin of such deceased person, not exceeding the sum of $15,000; Provided, that every such action shall be commenced within one year after the death of such person. Provided, further, that no action shall be brought or prosecuted in this State to recover damages for a death occurring outside of this State where a right of action for such death exists under the laws of the place where such death occurred and service of process in such

suit may be had upon the defendant in such place. As amended by act approved July 18, 1947."

The defendants denied negligence; later the defendants moved for summary judgment in the Circuit Court of Milwaukee County upon the sole contention that said action could not be maintained in Wisconsin because of the provision in Section 331.03 of the Wisconsin Statutes.

Plaintiff contended in the Circuit Court of Milwaukee County that this action was not brought under the Wisconsin Wrongful Death Act. (Sec. 331.03) but was brought under the Illinois statute; and that the proviso found in Section 331.03 of the Wisconsin Statutes did not prohibit the bringing of this action. The trial court sustained defendants' position and granted defendants summary judgment and dismissed the plaintiff's complaint on the merits.

The Supreme Court of the State of Wisconsin (two Justices dissenting) construed the Wisconsin statute as prohibiting access to the Wisconsin courts in enforcing an action for wrongful death based upon the statutes of Illinois, and affirmed the judgment of the trial court, summarily dismissing the plaintiff's complaint on the merits.

Summary of Argument

The historic function of the Full Faith and Credit Clause is to exert an integrating force in our federalism. For the states of the Union, the Full Faith and Credit Clause of the Federal Constitution abolished in large measure the principle of international law by which local policy may dominate the rules of comity. The room left for the play of conflicting policies is a narrow one.

The very purpose of the Full Faith and Credit Clause was to alter the status of the several states as independent foreign sovereignties, each free to ignore obligations created

under the laws of the others, and to make them integral parts of a single nation, throughout which a remedy upon a just obligation might be demanded as of right, irrespective of the state of its origin. That purpose ought not to lightly be set aside out of deference to local policy, which, if it exists, would seem to be too trivial to merit serious consideration when weighted against the policy of the constitutional provision and the interest of the state whose judgment is challenged.

The case at bar involves a statute of Wisconsin which has been construed by its highest court as denying access to the courts of Wisconsin for the enforcement of an action for damages for wrongful death caused in another state. The Illinois statute creating such right of action is refused enforcement by the Wisconsin courts.

In the absence of any difference in judgment (public policy) between the law of the forum and the law of the state where the act or transaction took place, as to its moral quality (none exists between the statute of Wisconsin and the state of Illinois here involved), every state is required to give full faith and credit to the rights created by the statute of any other state when invoked in the forum. With respect to the laws of the sister state, involving no conflict in substantive law with the law of the forum, no state is free to disclaim responsibility for enforcing the law of such sister state. Section 1, Article IV, and Section 1 of the Fourteenth Amendment, United States Constitution, require the striking down any state statute which directs its courts to close its doors or refuse to recognize and enforce therein the statute of a sister state with relation to acts done in that sister state, especially while enforcing a similar statute with relation to similar acts done in the state of the forum.

Broderick v. Rosner (1935), 294 U. S. 629, 79 L. ed. 1100, 56 S. Ct. 489, 100 A. L. R. 1133.

The Full Faith and Credit Clause of the United States Constitution forbids Wisconsin or any other state from denying access to its courts, howsoever much it may regard such withdrawal of jurisdiction the adjective law of the state or the exercise of its right to regulate the practice and procedure of its courts. Wisconsin cannot escape its constitutional obligations by the simple device of denying jurisdiction in such cases to courts otherwise competent.

Angel v. Bullington, 330 U. S. 183, 67. S. Ct. 657, 91 L. ed. 832.

The Full Faith and Credit Clause, like the Commerce Clause, has become a nationally unifying force. It altered the status of the several states (which, as independent sovereignties, would be free to ignore rights and obligations created under the laws of the others) by making each an integral part of a single nation in which rights established in any part are given nation-wide application.

Magnolia Petroleum Co. v. Hunt, 320 U. S. 430.

The cause of action for damages for wrongful death, such as was given to the plaintiff by the law of Illinois, has been characterized by Justice Cardozo as a property right. *Loucks v. Standard Oil Co.,* 224 N. Y. 99, 120 N. E. 198) For Wisconsin to refuse to enforce the property right, which the plaintiff has been given by the laws of Illinois, is to leave the plaintiff without a remedy and take away his property without due process of law. Wisconsin, in denying access to its courts to enforce a property right that the plaintiff acquired under the laws of Illinois, is in effect taking away plaintiff's property without due process of law in violation of Section 1 of the Fourteenth Amendment of the United States Constitution.

Introductory Statement

The Wisconsin Supreme Court decision here on appeal gives an admittedly new interpretation to Wisconsin's Wrongful Death Statute, Sec. 331.03; now construing this 90-year old statute to bar the enforcement in Wisconsin of a right and remedy conferred by the statutes of another state for wrongful death caused in such other state. On familiar principles, the constitutionality of Sec. 331.03 must be determined in the light of the construction placed upon it by the highest court in the State of Wisconsin.

In its decision, the Wisconsin Supreme Court says:

> "We agree with the learned trial judge that the enactment (as so construed) is not in contravention of the Full Faith and Credit Clause of the federal Constitution";

and adopts the view that *Chambers v. B. & O. Railroad Co.* (207 U. S. 142):

> "fully sustained the validity under the federal Constitution"

of a statute barring access to the forum for enforcement of a cause of action created by the statutes of another state.

Although the Wisconsin court indicates that there is sanction from this court for its decision, this court has never decided whether a state's effectuation of a policy denying enforcement to a foreign wrongful death statute is consistent with the full faith and credit obligation.

Note *64 Harv. L. Rev.* 327 (Dec. 1950).

The question thus squarely presented by the record in the case at bar is whether the federal Constitution does impose an obligation upon the courts of each state to adjudicate rights arising and claimed under the public laws of another state wherein occurred the asserted wrong or transaction;

or whether they can be relieved from this obligation by an act of the local legislature purporting to limit or deny jurisdiction; and particularly so when the same courts of the forum are, by state law, required to adjudicate rights otherwise identical arising and claimed under similar statutes of the forum.

Appellant maintains that both the Full Faith and Credit Clause (Art. IV, Sec. 1) and the Due Process Clause (Fourteenth Amendment) of our federal Constitution forbid the State to deny access to its courts for the adjudication of rights on the sole ground that those rights arose outside the forum.

I

The full faith and credit clause precludes any state in the union from denying access to its courts for the enforcement of rights created under the statutes of a sister state, especially when the forum enforces similar rights and remedies created by its own local law.

From a series of decisions of this court—more recent and more sharply focused upon the language of the Full Faith and Credit Clause than any cited in the opinions below—there emerge certain principles which require the reversal of the decision of the Wisconsin Supreme Court herein.

A. "Public acts"—Statutes—of a sister state, no less than her judgments, are within the sweeping command that full faith and credit must be given.

Broderick v. Rosner (1935), 294 U. S. 629, 642; 79 L. ed. 1100, 1107.

John Hancock Mutual Life Ins. Co. v. Yates (1936), 299 U. S. 178, 183; 81 L. ed. 106, 109.

Bradford Electric Light Co. v. Clapper (1932), 286 U. S.

145, 154-155, 76 L. ed. 1026, 1032 footnote 3, contains an exhaustive collection of authorities as far back as the Records of the Constitutional Convention, and quotes the implementing Act of Congress (of 1804). The Congressional Act has since been revised so as specifically to provide:

> "Such Acts, * * * so authenticated, shall have the same full faith and credit in every court within the United States * * * as they have by law or usage in the courts of such States, * * * from which they are taken."
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> (Act, June 25, 1948, ch. 646, Sec. 1; 62 Stat. 947, F. C. A., Title 28, Sec. 1738)
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> "Whatever the forum's power to refuse to enforce a cause of action based on a foreign statute, it is clear that Wisconsin could not on policy grounds have denied faith and credit to an Illinois judgment, which plaintiff could have presumably obtained by suing in Illinois. As to the full faith and credit clause, many decisions have differentiated between judgments and statutes, relying on the absence of a congressional act executing the clause as to statutes. But the 1948 revision of the Judicial Code seems to preclude such reasoning now. Even if there is justification in some situations for according a greater quantum of faith and credit to judgments than to unlitigated causes of action, it is difficult to see the practical benefits in the instant case of requiring the litigants to go into one state to get a judgment, and then to return and sue on it." Note 64 Harv. L. Rev. pp. 328, 329 (Dec. 1950)

B. As to rights governed by the statutes of a sister state, full faith and credit makes comity a constitutional duty rather than an act of grace which may be withheld at the pleasure of the state of the forum.

In 1935, in *Broderick v. Rosner*, 294 U. S. 629, 642, 79 L. ed. 1100, 1107, this Court held that the full faith and credit clause rendered nugatory a New Jersey statute, which, by imposing extremely onerous procedural difficulties, barred, for all practical purposes, enforcement in

New Jersey of personal liabilities of stockholders, created by or arising under laws of another state. The court, speaking through Justice Brandeis, set forth these principles:

> "The power of a State to determine the limits of the jurisdiction of its courts and the character of the controversies which shall be heard therein is subject to the limitations imposed by the Federal Constitution. * * * A *'State cannot escape its constitutional obligations (under the full faith and credit clause) by the simple device of denying jurisdiction in such cases to courts otherwise competent.'* * * * It is true that a State can legislate only with reference to its own jurisdiction, and that the full faith and credit clause does not require the enforcement of every right which has ripened into a judgment of another state or has been conferred by its statutes. But the room left for the play of conflicting policies is a narrow one.
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> * * *
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> "But it may not, under the guise of merely affecting the remedy, deny the enforcement of claims otherwise within the protection of the full faith and credit clause, when its courts have general jurisdiction of the subject matter and the parties. *For the States of the Union, the constitutional limitation imposed by the full faith and credit clause abolished, in large measure, the general principle of international law by which local policy is permitted to dominate the rules of comity.*"

In *Angel v. Bullington* (1947), 330 U. S. 183, 188, 91 L. ed. 832, 836, this Court referred to "the subordination to the requirements of the Constitution of the power of a state to withdraw jurisdiction from its courts," and said:

> "The Contract Clause, the Full Faith and Credit Clause, the Privileges or Immunities Clause, *all fetter the freedom of a State to deny access to its courts howsoever much it may regard such withdrawal of jurisdiction, 'the adjective law of the State,'* or the exercise of its right to regulate 'the practice and procedure' of its courts * * * A State 'cannot escape its constitutional

obligations by the simple device of denying jurisdiction in such cases to courts otherwise competent."

C. If there were a conflict between the legitimate interest of Wisconsin and the national policy of Full Faith and Credit, the relative weight of the two interests would be a question ultimately for decision by this Court.

Pink v. A. A. A. Highway Exp. (1941), 314 U. S. 201, 86 L. ed. 152, 137 A. L. R. 957, at p. 963:

> "It was the purpose of that provision to preserve rights acquired or confirmed under the public acts and judicial proceedings of one state by requiring recognition of their validity in others/ But the very nature of the Federal union of states, to each of which is reserved the sovereign right to make its own laws, precludes resort to the Constitution as the means for compelling one state wholly to subordinate its own laws and policy concerning its peculiarly domestic affairs to the laws and policy of others. When such conflict of interest arises it is for this Court to resolve it by determining how far the full faith and credit clause demands the qualification or denial of rights asserted under the laws of one state, that of the forum, by the public acts and judicial proceedings of another."

Williams v. State of North Carolina (1942), 317 U. S. 287, 63 S. Ct. 207, at p. 215:

> "This court, of course, is the final arbiter when the question is raised as to what is a permissible limitation on the full faith and credit clause."

The historic function of the Full Faith and Credit Clause is to act *as an integral force in our federalism.* The Full Faith and Credit Clause was designed to achieve uniform recognition of a litigant's rights as they would exist at the place of the transaction.

> "The full faith and credit clause like the commerce clause thus became a nationally unifying force. It altered the status of the several states as independent foreign sovereignties, each free to ignore rights and obligations created under the laws or established by the judicial proceedings of the others, by making each an integral part of a single nation, in which rights judicially established in any part are given nation-wide application in every part." • • •
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> *Magnolia Petroleum Co. v. Hunt,* 320 U. S. 430, 439; 88 L. ed. 149, 155, by Chief Justice Stone.

To like effect, *Milwaukee County v. White Co.,* 296 U. S. 268; *Williams v. North Carolina,* 317 U. S. 289.

Justice Jackson of this Court, in an important address, has recalled the historic function of the Full Faith and Credit Clause as an integrating force in our federalism.

Robert H. Jackson, Full Faith and Credit—The Lawyer's Clause of the Constitution, 45 Col. L. Rev. 1:

> at p. 2: "It was placed foremost among those measures which would guard the new political and economic union against the disintegrating influence of provincialism in jurisprudence, but without aggrandizement of federal power at the expense of the states."
> at p. 17: "It serves to coordinate the administration of justice among the several independent legal systems which exist in our federation."

See also article on *Chief Justice Stone and the Conflict of Laws,* 59 Har. L. Rev. (1946), 1210, 1233.

The right which the plaintiff seeks to have enforced in Wisconsin was given by the laws of Illinois, (Record, pp. 28-29), and arises out of the negligence of respondent in the operation of an automobile within Illinois whereby the death of appellant's decedent was caused in Illinois.

D. Actually the subject matter of the litigation—recovery of damages for wrongful death caused in Illinois—is such that no other state can be said to have any countervailing interest. What the highest court of Wisconsin calls "public policy" is simply a refusal, out of indifference, to give access to its courts for the enforcement of a public law of a sister state.

Wisconsin's Sec. 331.03, after language substantially reenacting the provisions of Lord Campbell's Act, concludes simply: "provided that such action shall be brought for a wrongful death caused in this state." It is in this last proviso that the Wisconsin Supreme Court now finds an assertion of "public policy" against enforcing the Illinois-created right of action.

Although appellant had supposed this proviso to be a mere restriction upon extraterritorial operation of the Wisconsin-created cause of action (a precaution understandable in view of the confusion in the law of Conflicts as it existed in 1857, when this statute was first enacted, although redundant in our times), we must assume here that the statute really says what the Wisconsin Supreme Court now says it means: "That no action shall be brought in Wisconsin for a wrongful death caused in any other state."

Attaching the label of "public policy" does not alter its character as a mere assertion of local inertia or indifference with respect to enforcement of rights originating outside the state; and that there is no genuine Wisconsin interest or "public policy" in any proper sense, to be weighed against the national policy of Full Faith and Credit.

The Wisconsin court's conclusion:

"* * * that public policy required (the result below)

is questionable. The Wisconsin statute might be construed as declaring the general conflict rule that the wrongful death statute of the jurisdiction where the death is caused governs, rather than as manifesting a legislative policy against enforcement of such foreign statutes. Wisconsin's own death statute indicates that the state does not consider the enforcement of such liability offensive to public morals; and a willingness to entertain a tort action based on the instant facts if the injury had not been fatal indicates the absence of a general policy against enforcing rights which arose outside the state. See *Buckeye v. Buckeye,* 203 Wis. 248, 234 N. W. 342 (1931)."

Note 64 Harv. L. Rev. 329 (Dec. 1950).

The present volume of interstate travel by automobile and the incidence of frequently fatal injury therein point up the importance of Wisconsin's denial of enforcement to rights and duties arising in interstate travel; and the frequency of litigation with respect to such rights emphasizes the effect of Wisconsin's indifference as against the national interest represented by the Full Faith and Credit Clause.

While the local indifference here assailed involves torts causing death, the principle involved applies to all torts and, indeed, to all transactions occurring outside the forum wherein a remedy is sought.

The situation at bar is exactly the same as if suit were brought on a note executed in New York by a New York resident, who later moved to Wisconsin. If the State of Wisconsin could say that it would not enforce in Wisconsin the note executed in New York, Wisconsin would wreck the interstate commerce provision of the Constitution. The Constitution so interpreted would then put it in power of each of the states to make an asylum for those who seek to avoid their just obligations.

The assertion of the judicial power by a state is some-

thing that the state cannot withhold or give at its unbridled pleasure—the Due Process Clause forbids it. The Full Faith and Credit Clause intends and insists that it should be affirmatively exercised.

Wisconsin can have no legitimate interest in establishing a refuge, against civil liabilities imposed by a sister state, for a person whose negligence has caused death of a human being.

The national interest of the case at bar so strongly preponderates against any alleged interest that Wisconsin may have that this court should direct that the wall of insulation set up by Wisconsin be torn down because of the command of the federal Constitution. The vice of the decision below is that it absolutely nullifies the Full Faith and Credit Provision of the United States Constitution.

In *Milwaukee County v. M. E. White Co.* (1935), 296 U. S. 269, 276-277, 80 L. ed. 220, 228, this court states:

> "The very purpose of the full faith and credit clause was to alter the status of the several states as independent foreign sovereignties, each free to ignore obligations created *inder the laws* or by the judicial proceedings of the others, and to make them integral parts of a single nation throughout which a remedy of a just obligation might be demanded as of right, irrespective of the state of its origin. *That purpose ought not lightly to be set aside out of deference to local policy, which, if it exists, would seem to be too trivial to merit serious consideration when weighted against the policy of the constitutional provision and the interest of the state whose judgment is challenged.* In the circumstances disclosed here no state can be said to have a legitimate policy against payment of its neighbor's taxes, and the obligation of which has been judicially established by courts to whose judgments in practically every other instance it must give full faith and credit. Compare *Fauntleroy v. Lum*, 210 U. S. 230, 52 L. ed. 1039, 28 S. Ct. 641."

Broderick v. Rosner, 294 U. S. 629, 79 L. ed. 1100, 1108:

> "Obviously recognition could not be accorded to a local policy of New Jersey, if there really were one, of enabling all residents of the State to escape from the performance of a voluntarily assumed statutory obligation, consistent with morality, to contribute to the payment of the depositors of a bank of another state of which they were stockholders."

The negligence and death caused thereby took place in Illinois; the consequences that flowered therefrom were, under elementary principles of Conflicts—private international law—peculiarly within the regulatory power of Illinois.

> *Restatement, Conflict of Laws*, Sec. 392; *Beale, The Conflict of Laws*, Vol. 2, p. 1307, Sec. 391.1.

"So much so," it was said in *Converse v. Hamilton*, 224 U. S. 243, 260; 56 L. ed. 749, 756, holding that Wisconsin must give full faith and credit to a Minnesota statute permitting suit by a Minnesota receiver, "that no other state properly can be said to have any public policy thereon."

The enforcement of a statutory right to collect assessments on behalf of defunct banks, or of taxes on behalf of a municipality, stands on no higher footing, and is not more entitled to Constitutional protection than the statutory right to recover damages for the wrongful death of a human being, conferred by the state wherein the wrong and the death occurred.

In this case we are not confronted with the difficulty that arises when the forum is asked to enforce rights conferred by the laws of other states, but arising out of transactions that would be condemned and treated as nugatory if they had occurred within the state. In such cases it may be hard

to compel the forum to give legal effect to what its statutes, its judges and its people may regard as immoral. No danger of compelling moral stultification is even remotely involved here. Wisconsin has no public policy that is against collecting damages for negligent homicide. On the contrary, with respect to deaths wrongfully caused within its borders, Wisconsin was one of the first of the states to modify the common law and to provide (in 1857) a statutory cause of action for wrongful death, modeled after Lord Campbell's Act. Until this case was decided, the Wisconsin courts for many years enforced wrongful death statutes of other states unaware of the "public policy" now found to lurk in her own.

In *Bain v. Northern Pacific Railroad Co.* (1904), 120 Wis. 412, 98 N. W. 241, the Wisconsin court permitted suit in Wisconsin on a Minnesota statute for death occurring in Minnesota (and the proviso in Sec. 331.03 was the same then as now). The Wisconsin court stated as follows, at p. 419:

> "So restricted, it presents no obstacle to the present action, depending on statutes of Minnesota of which practical counterparts exist here, and which therefore are *entirely in accordance with the public policy of Wisconsin as declared by its legislature.*"

And see *Sheehan v. Lewis* (1935), 218 Wis. 588, 593, 260 N. W. 633, where the Wisconsin court permitted suit to be brought in Wisconsin to enforce the Illinois Wrongful Death Statute.

The Wisconsin statute creates, for deaths caused in Wisconsin, the same right of action that the Illinois statute gives for deaths caused in that state.

Wisconsin has no policy or interest, other than mere indifference, to be weighed against the commands of full faith and credit; and indifference is not self-justifying.

While a state may refuse to entertain an action on a foreign statute, where it is an inconvenient forum, this ground is precluded in the case at bar by the Wisconsin residency of the litigants and the decedents.

It is clear that the aim of Wisconsin is retaliation against Illinois because of the language of the Illinois statute. Retaliation is, of course, an insufficient ground to justify denial of faith and credit to the Illinois statute.

II

Under the due process clause no state may refuse to enforce a right of action upon the sole ground that such right arose outside that state.

Wisconsin's statute, Sec. 331.03, as construed by its Supreme Court, is repugnant to United States Constitution, Fourteenth Amendment, which provides that no state shall "deprive any person of life, liberty or property, without due process of law." If the command of the Constitution is not so all inclusive, then may not Wisconsin or any other state deny access to its courts to one who seeks redress for any kind of injury caused by any kind of tort—whether to person or property—simply because the wrongful act was committed outside its borders? If it may, may it not also refuse to enforce any rights acquired under contract made in another state and governed by the laws of that state; why may not the state of the forum refuse to enforce a right in property taken from its owner in another state and brought into the forum, simply because that right arose in another state?

The effect of the decision below is to refuse plaintiff access to the Wisconsin courts to enforce a property right given to him by the laws of Illinois; it leaves plaintiff

without a remedy and takes his property away without due process of law. The impact of the decision below is to "balkanize" the states and permit each state to isolate itself from the rest of the Union by disclaiming interest in the protection of any and all rights originating in acts or transactions occurring outside its borders.

Appellant administrator contends that he was given a *property right* by the public laws of Illinois; that under the due process clause, as well as under the full faith and credit clause of the United States Constitution, Wisconsin may not refuse enforcement in its courts of such right.

A strong sense of the necessity of recognizing rights originating in sister states underlies decisions which stress the mandatory character of comity, even apart from constitutional requirements.

> *"There is a strong public policy favoring the enforcement of duties validly created by the law governing their creation. Denial of the enforcement of the foreign claim will result in an undeserved benefit to the defendant."*
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> *A. L. I. Restatement, Conflict of Laws,* Sec. 612, Comment e; see *Beach, Uniform Interstate Enforcement of Vested Rights* (1918), 27 Yale L. Jour. 656.

Recognition of foreign law is sometimes based on a theory known as the vested rights theory, which conceives of rights based on such law as property and to be protected within the limits of the policy of the forum. 15 C. J. S., *Conflict of Laws,* Sec. 3, p. 840.

The clearest statement on the subject, however, is that made by Justice Cardozo, speaking for the New York Court of Appeals, in *Loucks v. Standard Oil Co.* (1918), 224 N. Y. 99, 120 N. E. 198, 201. The sole question before the New York court was whether a Massachusetts statute governing

death caused in that state ought to be enforced by the courts of New York.

"A foreign statute is not law in this state, but it gives rise to an obligation, which, if transitory, 'follows the person and may be enforced wherever the person may be found.' * * * 'it is a principle of every civilized law that vested rights shall be protected.' * * * The plaintiff owns something, and we help him to get it. * * * 'The law of the forum is material only as setting a limit of policy beyond which such obligations will not be enforced there.' * * *

"If aid is to be withheld here, it must be because the cause of action in its nature offends our sense of justice or menaces the public welfare.

"Our own scheme of legislation may be different. We may even have no legislation on the subject. That is not enough to show that public policy forbids us to enforce the foreign right. *A right of action is property.* If a foreign statute gives the right, the mere fact that we do not give a like right is no reason for refusing to help the plaintiff in getting what belongs to him. * * * Similarity of legislation has indeed that importance; its presence shows beyond question that the foreign statute does not offend the local policy. * * * The misleading word 'comity' has been responsible for much of the trouble. It has been fertile in suggesting a discretion unregulated by general principles. * * *

"* * * there is nothing in the Massachusetts statute that outrages the public policy of New York. * * * The fundamental policy is that there shall be some atonement for the wrong. * * * It cannot be that public policy forbids our courts to help in collecting what belongs to them. * * *

"We hold, then, that public policy does not prohibit the assumption of jurisdiction by our courts, and that this being so, mere differences of remedy do not count. * * * We must apply the same rules that are applicable to other torts; and the tendency of those rules today is toward a larger comity, if we must cling to the traditional term. * * *

> *" * * * The fundamental public policy is perceived to be that rights lawfully vested shall be everywhere maintained. At least, that is so among the states of the Union. * * * There is a growing conviction that only exceptional circumstances should lead one of the states to refuse to enforce a right acquired in another. The evidences of this tendency are many."* (emphasis added)

To the same effect is *Curtis v. Campbell* (C. C. A. Pa. 1935), 76 F. 2d 84, 85 (certiorari denied, 295 U. S. 737, 79 L. ed. 1685) where the court pointed out that a right of action given by a foreign death statute is a property right that ought to be protected.

The court of appeals continued, at p. 851 of 74 F. 2d 849, saying:

> "There is a marked difference between public policy —something that affects 'good morals or natural justice,' or the 'general interest of the people of the state,' justifying refusal to enforce a foreign right of action— and mere difference in state laws with respect to a particular subject."

The standard of morality and justice which Wisconsin *sets for itself* not only permits but requires its courts to try actions for wrongful death caused within its borders. Sec. 331.03, *Wis. Stats.* How can it be immoral or unjust—by that very standard—to try such actions for wrongful death caused outside its borders?

III

The authorities principally relied upon in the decisions below are readily distinguishable.

The opinion both of the Wisconsin Supreme Court and of the trial court lean heavily on *Dougherty v. American*

McKenna Process Co., 255 Ill. 369, 99 N. E. 619, L. R. A. 1915 F. 955, which, in turn, relies on:

> *Paul v. Virginia*, 8 Wall, 168, 19 L. ed. 357; and *Chambers v. Baltimore & Ohio Railroad Co.*, 207 U. S. 142, 28 Sup. Ct. 34, 52 L. ed. 143.

The decision of the Illinois Supreme Court in the *Dougherty Case* was never appealed to or discussed in this court. However, the *Dougherty Case* was among those cited to this Court by counsel for appellee in *Broderick v. Rosner*, 294 U. S. 629, 79 L. ed. 1100, 1103, for the contention that:

> "The full faith and credit clause of the Constitution of the United States does not compel a state to open and lend its courts to the prosecution of a suit based upon a cause of action created by the statutes of another state."

This court, in *Broderick v. Rosner*, without referring to the *Dougherty Case* decision, repudiated that contention and reached a conclusion directly opposed to *Dougherty*.

Except that it is the mainstay of the decisions below and the chief source of their citations, *Dougherty* would not merit even this much discussion. Its fallacy is manifest, but the courts below could not be dissuaded from the same error, namely—confusion between: (a) the giving of extra-territorial effect to a state statute, and (b) the application by the forum of the law of the place where the operative facts or transactions took place.

The existence of this confusion is demonstrated by the extensive reliance on the *Dougherty Case* (carried over into the opinions below in this case) upon *Paul v. Virginia* (1868), 8 Wall, 168, 19 L. ed. 357. Paul, as agent for several insurance companies incorporated in New York, was indicted in Virginia for issuing insurance policies in Virginia without having obtained a license as required by

Virginia. This Court, 19 L. ed. (8 Wall.) at p. 360, held that the laws of the state of incorporation cannot determine the rights or duties of the corporation arising from the acts of its agents *in Virginia*. This is a very different proposition from holding that Virginia is not obligated to apply New York law with respect to acts or transactions that took place *in New York;* and *Paul v. Virginia* did not so hold.

Chambers v. Baltimore & Ohio Railroad Co., 207 U. S. 142, 28 S. Ct. 34, 52 L. ed. 143, is also relied on by the courts below. *Chambers* discussed only the Privileges and Immunities Clause.

Broderick v. Rosner, 294 U. S. 629, 79 L. ed. 1100, 1107, footnote 3 of the opinion states:

> "*Chambers v. Baltimore & Ohio Railroad Co.*, 207 U. S. 142, 52 L. ed. 143, 28 S. Ct. 34, is not to the contrary; there no claim was made under the full faith and credit clause."

An appendix follows the Conclusion listing other authorities analyzing aspects of the problem before this Court for review.

Conclusion

It is submitted that Sec. 331.03 of the Wisconsin Statutes, as construed by the Supreme Court of the State of Wisconsin, fails to give full faith and credit to the public laws of a sister state in violation of Sec. 1, Article IV, of the United States Constitution. Wisconsin, in denying access to its courts in enforcing a property right that the plaintiff acquired under the laws of Illinois, is, effect, taking away the plaintiff's property without due process of law in violation of Sec. 1 of the Fourteenth Amendment of the United States Constitution. This Court should strike down and

hold invalid Sec. 331.03 of the Wisconsin Statutes as construed by its highest court.

For the reasons stated, it is respectfully submitted that the judgment of the court below should be reversed.

Respectfully submitted,
SAMUEL GOLDENBERG,
Counsel for Appellant.

HARRY A. KOVENOCK,
Attorney.

APPENDIX

While there is a paucity of judicial authorities directly on point on the subject matter involved, legal scholars and writers have analytically reviewed many aspects of the problem and their writing bear evidence of careful investigation.

1. The proceedings with reference to the adoption of Sec. 1, Article IV, U. S. Const., are set forth in *2 Farrand, The Records of the Federal Convention* (1911), 188, 447-448, 484-486, 488-489, reviewed and commented upon in *Cook, The Logical and Legal Bases of the Conflict of Laws* (1942) 90; *Costigan, The History of the Adoption of Section 1 of Article IV* (1904), 4 Col. L. Rev. 470. See also note, 38 Harv. L. Rev. 805.

2. The individual courts of a federated union often find that their own local policies must frequently give way to broader national interests. *Dodd, State Government,* (2d ed.) (1918) 134. *Dodd, The Power of the Supreme Court to Review State Court Decisions in the Field of Conflict of Laws* (1926), 39 Har. L. Rev. 532. *Annotation on Federal Constitution and Conflict of Laws as to Rights Not Based on Judgments,* 134 A. L. R. 1472. *Lorenzen, Territorially, Public Policy and the Conflict of Laws* (1924), 33 Yale L. Jour. 750. *Cavers, A Critique of the Choice-of-Law Problem,* 47 Harv. L. Rev. 173.

3. As early as 1908, Professor Schofield had urged that the Due Process clause ought to protect against all error in state decisions, not only in the field of conflicts but in any sort of case, on purely domestic facts, so that any erroneous state decision would be reversible by this court. *Schofield, The Supreme Court of the United States and the Enforcement of State Law by the State Courts* (1908), 3

Ill. Law Rev. 195. *G. W. C. Ross, in his article Has the Conflict of Laws become a Branch of Constitutional Law?* (1931), 15 Minn. L. Rev. 161, 166, states that it would probably be fortunate if this court adopted Professor Schofield's position. See also the *Due Process and Full Faith and Credit Clauses as applied to the Conflict of Laws* (1917), 26 Yale L. Jour. 405; *Beach, Uniform Interstate Enforcement of Vested Rights* (1918), 27 Yale L. Jour. 656; *Langmaid, The Full Faith and Credit Required for Public Acts* (1929), 24, Ill. L. Rev. 383.

In this case appellant's case does not require so advanced a position. Here it is the statute of the forum which the Wisconsin court construes to be a bar to its doors against enforcement therein of a right given by an Illinois statute, for which the federal Constitution requires full faith and credit.

4. On the proper concept of "public policy" as against the "closed door," see (1) *Loucks v. Standard Oil Co.*, 224 N. Y. 99, 120 N. E. 198; (2) *Coster v. Coster*, 289 N. Y. 438, 46 N. E. (2d) 509, 146 A. L. R. 702; (3) *In re McCurdy's Estate*, 303 Pa. 453, 154 Atl. 707; (4) *Biewend v. Biewend*, 17 Cal. (2d) 117, 109 Pac. (2d) 701, 132 A. L. R. 1265; 15 C. J. S. *Conflict of Laws*, Sec. 4, p. 854; *Restatement of the Law, Conflict of Laws*, Sec. 612, pp. 731-732.

5. It has been suggested that since the public policy asserted is usually unrelated to public morals or substantial justice, excluding actions on grounds of public policy should never be permitted: See: *Goodrich, Foreign Facts and Local Fancies*, 25 Va. L. Rev. 26 (1938); *Beach, Uniform Interstate Enforcement of Vested Rights*, 27 Yale L. Rev. 656 (1918).

6. To the proposition that a cause of action for wrongful

death given by the statutory laws of a sister state is a vested right that should be enforced by the courts of all other states, see (1) *Goodrich, Conflict of Laws*, Sec. 102 (1949); (2) *Loucks v. Standard Oil Co.*, 224 N. Y. 99, 120 N. E. 198; (3) *Curtis v. Campbell* (C. C. A. Pa. 1935), 76 F. (2d) 84.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 355

CORBIN D. HUGHES, ADMINISTRATOR OF THE ESTATE OF HAROLD G. HUGHES,

Plaintiff and Appellant,

vs.

GLENN C. FETTER AND FARMERS MUTUAL AUTOMOBILE INSURANCE COMPANY, A WISCONSIN CORPORATION,

Defendants and Respondents

STATEMENT AGAINST THE JURISDICTION OF THE UNITED STATES SUPREME COURT ASSERTED BY APPELLANT.

Section 331.03 of the Wisconsin Statutes (Wrongful Death Statute), in prohibiting the maintenance of an action in Wisconsin based upon the Wrongful Death Statute of another state by limiting the right to bring an action for wrongful death only "for a death caused" in Wisconsin, does not contravene either Section I, Article IV (full faith and credit clause) of the United States Constitution or Section I of the Fourteenth Amendment (due process

clause) to the United States Constitution but is a valid expression of the public policy of the State of Wisconsin.

The authority in support of the foregoing, in addition to that contained in the decision of the Wisconsin Supreme Court, is as follows:

16 *American Jurisprudence, Death,* Sec. 405, p. 263;

11 *American Jurisprudence, Conflict of Laws,* Secs. 11 and 183, pp. 310, 495;

Gray, et al. v. *Blight* (CCA 10th), 112 F. (2d) 696 (1940). (Writ of certiorari denied in 311 U. S. 704, 61 S. Ct. 170, 85 L. Ed. 457);

Kroger Grocery & Baking Co. v. *Reddin* (CCA 8th), 128 F. (2d) 787, 789-91;

Klaxon Co. v. *Stentor Electric Mfg. Co. Inc.,* 313 U. S. 487, 497-8, 61 S. Ct. 1020, 1022;

Pacific Employers Insurance Co. v. *Industrial Accident Comm.,* 306 U. S. 493, 59 S. Ct. 629, 83 L. Ed. 940;

100 Annotated Law Reports, p. 1143, 1145, note;

Loucks v. *Standard Oil Co.,* 224 N. Y. 99, 120 N. E. 198, 202, (1918). (Citing *Dougherty* v. *American McKenna Process Co.,* 225 Ill. 269, 99 N. E. 619)

Respectfully submitted,

ROBERT H. HOLLANDER,
Counsel for Appellees.

HANNAN, JOHNSON & GOLDSCHMIDT,
HERBERT L. WIBLE,
Of Counsel.

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In the Supreme Court of the United States

October Term, 1950 - - - - - - Number 355

CORBIN D. HUGHES, Administrator of the Estate of Harold G. Hughes,

Plaintiff-*Appellant*,

vs.

GLENN C. FETTER and FARMERS MUTUAL AUTOMOBILE INSURANCE COMPANY, a Wisconsin Corporation,

Defendants-*Respondents*.

Appeal from the Supreme Court of the State of Wisconsin

BRIEF OF APPELLEES

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Attorneys.

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In the Supreme Court of the United States

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CORBIN D. HUGHES, Administrator of the Estate of Harold G. Hughes,

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Defendants-*Respondents*.

Appeal from the Supreme Court of the State of Wisconsin

BRIEF OF APPELLEES

OPINION BELOW.

The opinion of the Supreme Court of the State of Wisconsin is reported in *Hughes vs. Fetter*, 257 Wis. 35, 42 N. W. (2d) 452, and may be found on pages 30 to 36, both inclusive, of the printed record.

JURISDICTION.

The order of the Hon. Oscar M. Fritz, Chief Justice of the Wisconsin Supreme Court, was entered August 29, 1950. The order of this court noting probable jurisdiction was entered on November 13, 1950. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28, United States Code, Section 1257 (2).

STATE STATUTE INVOLVED.

Wisconsin Revised Statutes, Section 331.03, is involved and reads as follows:

> "*Recovery for death by wrongful act.* Whenever the death of a person shall be caused by a wrongful act, neglect or default and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who, or the corporation which, would have been liable, if death had not ensued, shall be liable to an action for damages notwithstanding the death of the person injured; provided, that such action shall be brought for a death caused in this state."

QUESTION PRESENTED.

Does the full faith and credit clause, Art. IV, Sec. 1, and the due process clause, Fourteenth Amendment, Sec. 1, United States Constitution, require Wisconsin to enforce a cause of action founded upon the wrongful death statute of the State of Illinois where such enforcement would be contrary to the public policy of Wisconsin, as expressed by Sec. 331.03, Statutes of Wisconsin, prohibit-

ing the maintenance of an action for a wrongful death not caused within Wisconsin?

STATEMENT.

The plaintiff and appellant, Corbin D. Hughes, a resident of Wisconsin, after his appointment by the County Court of Milwaukee County as administrator of the estate of his son, Harold G. Hughes, deceased, commenced this action in the Circuit Court of Milwaukee County for the wrongful death of his said son based upon the wrongful death statute of the State of Illinois, Secs. 1 and 2, Chapter 70, Smith-Hurd Illinois Annotated Statutes. (R. 15, 28-29)

The son was injured in Illinois while riding as a passenger in an automobile driven by the defendant, Glenn C. Fetter, and died as a result of said injury in said state. At the time of his injury and death, the said Harold G. Hughes was a resident of Wisconsin. The defendant, Fetter, likewise, was a resident of Wisconsin and was such a resident at the time of the commencement of this action against him.

Judgment was entered in the trial court against the plaintiff dismissing his complaint upon the ground that the Wisconsin death statute, Sec. 331.03, Wisconsin Statutes (R. 21), forbids the bringing of an action for wrongful death in Wisconsin unless the death was caused therein. Upon appeal, the Wisconsin Supreme Court, in affirming the judgment of dismissal, held that the statute, so construed, did not contravene either the full faith and credit clause or the privilege and immunities clause of the United States Constitution. (R. 31-32)

SUMMARY OF ARGUMENT.

The decision of the Wisconsin Supreme Court, from which this appeal is taken, held that the Wisconsin death statute, Sec. 331.03, Wisconsin Statutes, limits the jurisdiction of the Wisconsin courts in a wrongful death action to one brought for a death caused in Wisconsin; that the legislature expressed the public policy of the state in this regard positively in a statute and that this policy must prevail to the exclusion of appellant's action, based on the Illinois wrongful death statute, in the Wisconsin courts. The appellant now contends that the Wisconsin statute, so construed, causes it to violate the full faith and credit clause and the due process clause of the United States Constitution.

The Wisconsin statute, so construed, does not contravene the full faith and credit clause because this clause does not require the enforcement of every right conferred by a statute of another state when the enforcement of such right would be contrary to the public policy of the forum.

As the full faith and credit clause establishes a rule of evidence rather than of jurisdiction, the effect of the Illinois statute upon which plaintiff bases his cause of action is fixed both by the Constitution and by the act of Congress passed in pursuance thereof (28 U. S. C. Sec. 1738) if the appellant can find a court into which he has a right to come. The Constitution, however, does not require the State of Wisconsin to provide a court for him against its will.

Decisions by the Supreme Court of the United States made subsequent to the decision in *Broderick vs. Rosner* (1935), 294 U. S. 629, 55 S. Ct. 589, refute the contention that the *Broderick* decision holds that the full faith and

credit clause of the Federal Constitution requires practically unlimited extraterritorial recognition of all statutes.

Whatever the purpose of the Wisconsin legislature may have been in confining the jurisdiction of its courts to those actions for wrongful death in which the wrongful act, neglect or default causing death occurred in Wisconsin, if it was to give statutory force to the doctrine of *forum non conveniens* then appellant's action is an appropriate one for the application of the doctrine. The trial of the action in Illinois, the state in which the cause of action arose, would be more easy, expeditious and less expensive than in Wisconsin.

The decisions principally relied upon by the appellant on appeal to this court are readily distinguishable from this case as they either deal with the enforcement of statutes governing statutory assessment of corporation stockholders or the members of a mutual insurance company or with the enforcement of a judgment and not, as here, with an unlitigated cause of action based upon the wrongful death statute of another state. An action based on the former is entitled to a greater amount of faith and credit by a state of the forum than is accorded to the latter.

As the states of Wisconsin and Illinois alone restrict the jurisdiction of their respective courts to actions for wrongful death caused within the state, no large national interest is involved justifying a disregard of the public policy of Wisconsin in excluding appellant's action for wrongful death based upon the statute of Illinois, which declares the very same public policy expressed by the Wisconsin statute. Furthermore, as ample judicial precedent exists for refusing full faith and credit by a state of the forum to such laws of another state as direct the adding of interest to the principal sum in contract actions *(Klaxon*

Co. vs. Stentor Electric Mfg. Co., post, p. 16), as provide for the equitable distribution of the assets of an insolvent corporation *(Clark vs. Williard,* post, p. 15), and provide for the survival of an action for personal injury against the personal representative of a deceased tort feasor *(Gray et al vs. Blight* and *Dougherty vs. Gutenstein,* post, pp. 17, 18) without any attempt to evaluate a contrary public policy of the state of the forum from the standpoint of good morals or of "natural" justice, no basis exists for any attempt to evaluate from the same standpoint the policy fixed by the Wisconsin statute excluding actions for wrongful death from its courts where death was not caused in Wisconsin as is contended for by appellant.

The result of the decision below was to leave appellant's cause of action unaffected because the denial of a remedy to him in Wisconsin left unimpaired his substantive right to be enforced elsewhere in a court that has jurisdiction of his action. As defendant, Fetter, may be subject to suit in this type of case in Illinois, appellant is not deprived of the right to maintain his action there.

The view that a right of action given by a foreign death statute is a property right that ought to be protected is subject to the limitation that due process does not require enforcement of such a right when to do so would be contrary to the public policy of the forum. As a consequence, there has been no taking of any property of the appellant in violation of the due process clause of the Constitution.

The Wisconsin death statute, Sec. 331.03, Wisconsin Statutes, limiting the jurisdiction of its courts in the manner that it does, expresses a valid public policy and violates no right secured to the appellant by the United States Constitution.

ARGUMENT.

I.

The Wrongful Death Statute of Wisconsin, Construed to Prohibit the Maintenance of an Action Based Upon the Wrongful Death Statute of Another State, Does Not Violate the Full Faith and Credit Clause, Art. IV, Sec. 1, of the United States Constitution.

A — The Public Policy of Wisconsin as Expressed in Its Wrongful Death Statute, Sec. 331.03, Stats., Prohibits the Maintenance of an Action Based Upon the Wrongful Death Statute of Another State by Limiting the Right to Bring Such an Action Only for a Death Caused in Wisconsin.

The proviso limiting jurisdiction contained in the Wisconsin wrongful death statute, adopted in 1857, reads as follows:

> "* * * ; provided, that such action shall be brought for a death caused in this state."

The counterpart of the foregoing in the Illinois statute, upon which appellant bases his cause of action, is as follows:

> "Provided further, that no action shall be brought or prosecuted in this state to recover damages for death occurring outside of this state where a right of action for such death exists under the laws of the place where such death occurred and service of process in such suit may be had upon the defendant in such place."

The first part of the proviso, ending with the words "outside of this state," was created by the Illinois Laws

of 1903, page 217, Section 1, and the remaining part thereof was added by the Laws of 1935, page 916, Section 1.

The Wisconsin Supreme Court upheld the decision of the trial court in this case that the Wisconsin proviso, in order to have any force or meaning, possesses the same meaning as its counterpart in the Illinois death statute, i.e., it prohibits the bringing of an action for a death occurring outside of Wisconsin and not caused therein, and affirmed the judgment dismissing appellant's complaint.

Hughes vs. Fetter, 257 Wis. 35, 42 N. W. (2d) 452.

See, also,

Crane vs. Chicago & Western Indiana Railroad Co., 233 Ill. 259, 84 N. E. 222; *Dougherty vs. American McKenna Process Co.*, 255 Ill. 369, 99 N. E. 619, L. R. A. 1915F, Ann. Cas. 1913D, 568 and *Rudiger vs. Chicago, etc., R. Co.*, 94 Wis. 191.

By limiting the jurisdiction of its courts in a wrongful death action to one "brought for a death caused in this state," the Wisconsin legislature expressed the public policy of the state positively in a statute and that policy must prevail to the exclusion of appellant's action in the Wisconsin courts.

Dougherty vs. McKenna Process Co., 99 N. E. 619, 621.

"The general rule as to the right to sue in one state under the statute of another state permitting recovery for death by wrongful act is subject to the qualification that the statute of the state under which the cause of action arose shall not be incon-

sistent with the public policy of the state in which the right of action is sought to be enforced. According to some authorities, the standard for measuring the public policy of the forum is the statute thereof."

16 *Am. Jur., Death,* Sec. 405;

Stewart vs. Baltimore & O. R. Co., 168 U. S. 445, 18 S. Ct. 105.

"It is conceded by all the courts that it is not strict right, but comity, which enables one to bring an action in one state or country for a tort, such as negligent death or bodily injuries, caused in another, and that under the principles of comity, such an action will not be entertained if it would violate the public policy of the forum. Thus, a state may refuse the maintenance of an action on a tort arising elsewhere."

11 *Am. Jur., Conflict of Laws,* Sec. 183.

"The statute in another state cannot be made the basis of furnishing a remedy for action in Wisconsin whose maintenance would be wholly inconsistent with the public policy of our state as declared by the legislature. To hold that this action could be maintained notwithstanding that death was not caused in this state would be to override such public policy as declared by statute and would operate to deprive the proviso of purpose or meaning. The plaintiff seeks a remedy denied him by the law of the forum. *Estate of Seybold,* 223 Wis. 192."

Hughes vs. Fetter, supra, p. 42, R. 35.

In *Bain vs. Northern Pacific R. Co.*, 120 Wis. 412, 98 N. W. 241, and in *Sheehan vs. Lewis*, 218 Wis. 588, 260 N. W. 633, actions were maintained on a cause of action based upon the death statute of a state other than Wisconsin for a death not caused in the latter state. No mention of the proviso to Sec. 331.03, Wisconsin statutes, is made in either of the decisions. As a consequence, neither can be cited as proper precedent for the maintenance of appellant's action.

Hughes vs. Fetter, supra, p. 40, R. 35;

State ex rel. Sheboygan vs. Sheboygan County, 194 Wis. 456, 459, 216 N. W. 144, 145.

B — The Statutory Public Policy of Wisconsin Limiting the Jurisdiction of its Courts in Wrongful Death Actions to Those in Which the Death Was Caused in Wisconsin Does Not Contravene the Full Faith and Credit Clause, Art. IV, Sec. 1, of the United States Constitution.

"A statute forbidding the maintenance within the state of actions brought on injury statutes of other states does not contravene a provision of the Federal Constitution requiring each state to give full faith and credit to the public acts, records and judicial proceedings of every other state."

11 *Am. Jur., Conflict of Laws*, Sec. 183, citing *Dougherty vs. American McKenna Process Co.*, supra.

"The sovereign in its discretion may refuse its aid to the foreign right."

Justice Cardozo in *Loucks vs. Standard Oil Co.* (1918), 224 N. Y. 99, 120 N. E. 198, 202, citing in support thereof *Dougherty vs. Am. McKenna Process Co.*, supra, cited by the Wisconsin court in its decision in this case.

"The full faith and credit clause of the Federal Constitution does not require the enforcement of every right conferred by a statute of another state, as where the forum fails to provide a court with jurisdiction of the controversy, where it fails to provide procedure appropriate to its determination, where the enforcement of the right conferred would be obnoxious to the public policy of the forum, * * *."

11 *Am. Jur., Conflict of Laws*, Sec. 11, footnote 13, citing *Fuller vs. Rock*, 125 Ohio St. 36, 180 N. E. 367; 82 *A. L. R.* 802.

"Where this Court has required the state of the forum to apply the foreign law under the full faith and credit clause or under the Fourteenth Amendment it has recognized that a state is not required to enforce a law obnoxious to its public policy. Bradford Electric Co. vs. Clapper, 286 U. S. 145, 160, 161, 52 S. Ct. 571, 576, 76 L. Ed. 1026, 82 A. L. R. 696; Hartford Indemnity Co. vs. Delta Co., 292 U. S. 143, 150, 54 S. Ct. 634, 636, 78 L. Ed., 1178, 92 A. L. R. 928."

Griffin vs. McCoach, 313 U. S. 498, 507, 61 S. Ct. 1023, 1027.

In *Anglo-American Provision Co. vs. Davis Provision Co.*, 191 U. S. 373 24 S. Ct. 92, it was held that the full faith and credit clause was not violated where the New

York statute denied jurisdiction to its courts of plaintiff's cause of action *because it did not arise within that state.* The Wisconsin wrongful death statute, therefore, by denying jurisdiction to its courts of a cause of action for wrongful death not caused in Wisconsin, i.e., originating in another state under the laws of that state, does not violate the full faith and credit provision of the Federal Constitution.

We quote from the opinion, delivered by Mr. Justice Holmes, 191 U. S. 373, 374, 24 S. Ct. 92, 93, as follows:

> "The state court decides that the cause of action did not arise within the state in the sense of the words of the Code, and, of course, we follow its construction, subject to the inquiry whether the statute as construed is consistent with the Constitution of the United States. See *Northern C. R. Co. vs. Maryland,* 187 U. S. 258, 267, 47 L. Ed. 167, 172, 23 Sup. Ct. Rep. 62. The court also decides that the language goes to the jurisdiction of the court.
>
> "We are of the opinion that the section of the Code as construed is not unconstitutional. The precise point has not been decided by this court, but it has been laid down in cases which raise greater difficulties than the present, that this provision of the Constitution establishes a rule of evidence rather than of jurisdiction. *Wisconsin vs. Pelican Ins. Co.,* 127 U. S. 265, 291, 32 L. Ed. 239, 243, 8Sup. Ct. Rep. 1370; *Andrews vs. Andrews,* 188 U. S. 14, 36, 47 L. Ed. 366, 371, 23 Sup. Ct. Rep. 237. The Constitution does not require the state of New York to give jurisdiction to the supreme (circuit) court against its will. If the plaintiff can find a court into which it has a right to come, then the effect of the

judgment is fixed by the Constitution and the act in pursuance of it which Congress has passed. Rev. Stat. Sec. 905 (U. S. Comp. Stat. 1901, p. 677). But the Constitution does not require the state to provide such a court. See *Missouri vs. Lewis*, 101 U.S. 22, 30, *sub. nom Bowman vs. Lewis*, 25 L. Ed. 989, 992."

C — The Contention That the Decision in Broderick vs. Rosner (1935), 299 U. S. 629, 55 S. Ct. 589, Is Authority for the Proposition That the Full Faith and Credit Provision Practically Abolished the Right of a State to Deny Enforcement of Rights, Contrary to Its Public Policy, Arising Under the Statute of Another State, Is Refuted by the Decisions in Subsequent Cases Which Accord No Such Wide Sweeping Effect to the Broderick Decision.

Despite the foregoing, the appellant contends that the case of *Broderick vs. Rosner*, supra, is authority for the proposition that no state can, consistently with the full faith and credit and due process clauses of the United States Constitution, bar by statute the assertion in its courts of a cause of action created under the statute of another state for a death wrongfully caused therein.

That the *Broderick* decision has no such wide-sweeping effect is pointed out in the annotation to the case in 100 *A. L. R.*, 1143 at 1145, as follows:

"Although there are implications that the full faith and credit provision practically abolished the right of a state to deny enforcement of rights, contrary to its public policy, arising under the statute of another state, it is believed that the court did

not intend to adopt a rule as general as this, and that, in view of its recent pronouncement upholding the operative effect of the local public policy to defeat enforcement of rights acquired under the laws of a sister state, which, but for such policy, would be protected under the full faith and credit provision, contrary implications in the reported case (Broderick vs. Rosner (U. S.) ante, 1133), must be taken as qualified by other statements negativing a change in that position, and as being confined to the particular situation before the court. Perhaps the outstanding ground, the ratio decidendi, of the opinion, is that New Jersey may not, under the guise of merely limiting the jurisdiction of its courts, otherwise competent to adjudicate such matters, deny enforcement of rights acquired under the statute of a sister state, which must be given full faith and credit. It is submitted that this ground does not deny to New Jersey the right under its local public policy, if she has a general public policy against stockholders' superadded statutory liability as distinguished from a limited public policy against statutory superadded liability under the statute of another state, to decline to enforce such liability arising under such statute. It merely refuses to recognize the existence in New Jersey of such a local public policy as would warrant the refusal to enforce foreign acquired rights. It would seem that, had New Jersey withheld jurisdiction from its courts to enforce superadded liability of stockholders generally, irrespective of the source from which such liability sprang, a local public policy which would warrant her to decline enforcement of liability arising under the foreign statute would have been established,

and such right would have been conceded even under the full faith and credit provision.'"

(See *Order of United Commercial Travelers vs. Wolfe,* 331 U. S. 586, 616, 67 S. Ct. 1355, 1369, where Mr. Justice Burton, in quoting from the *Broderick* decision, refers to the New Jersey statute as a "special" one, i.e., one establishing a special local policy as opposed to a general public policy.)

The case note then continues by stating that:

"Such an interpretation of the opinion in the *Broderick* case (U. S.) supra, is the only view which reconciles that case with the decision in *Clark vs. Williard* (1935), 294 U. S. 211, 79 L. Ed. 865, 55 S. Ct. 356, 98 A. L. R. 347 * * *."

In *Clark vs. Williard,* supra, decided subsequent to the *Broderick* case, it appears that Montana had a local public policy, applicable alike to foreign and domestic corporations, of subordinating the title of the liquidator appointed under a statute of another state (Iowa) to the lien of execution and attachment creditors against property in Montana of the insolvent foreign corporation debtor obtained subsequent to the appointment of the liquidator.

Mr. Justice Cardozo, delivered the opinion of the Court, which states, among other things, as follows:

"Iowa may say that one who is a liquidator with title, appointed by her statutes, shall be so recognized in Montana with whatever rights and privileges accompanying such recognition according to Montana law. * * * Iowa may not say, however, that a liquidator with title who goes into Montana may

set at naught Montana law as to the distribution of Montana assets, and carry over into another state the rule of distribution prescribed by the statutes of the domicile."

Clark vs. Williard, supra, 294 U. S. 211, 215, 55 S. Ct. 356, 358, 98 *A. L. R.* 347, 376, note.

The result of this decision was to give effect to the Montana law permitting a preference among creditors of the Iowa corporation as to its property in Montana and to give no "faith or credit" to the Iowa statute providing for equitable distribution of the assets.

If the *Broderick* decision had the wide sweeping effect contended for it, the local policy of Montana of tolerating preferences and a race of diligence among creditors would have been required to yield to the Iowa statute governing liquidation of the insolvent Iowa corporation. Very obviously, then, local public policy, as expressed in a state statute, may be allowed to prevail against the statute of another state on the same subject without violating the full faith and credit clause of the Federal Constitution. Most certainly, if the conflicting public policies are to be evaluated as to their respective equities or justice, the Iowa statute should have prevailed, as preferences among those similarly situated is consistent with neither equity nor justice. A right "established in one part of the nation" was not given "nation-wide application in every part" as the decision in *Magnolia Petroleum Co. vs. Hunt*, 320 U. S. 430, 439, 64 S. Ct. 208, 213, requires, according to appellants.

Also, in *Klaxon Co. vs. Stentor Electric Mfg. Co., Inc.*, 312 U. S. 487, 498, 61 S. Ct. 1020, 1022, it was contended that the full faith and credit clause required the state

courts of Delaware to give effect to the New York statute, in connection with an agreement executed in New York, directing that in contract actions interest be added to the principal sum. It was held that *the Constitution does not insure unlimited extraterritorial recognition of all statutes, or of any statute under all circumstances* and that Delaware might disregard the New York statute with respect to adding interest to the principal sum if such application would interfere with its local policy.

In *Gray, et al. vs. Blight* (C. C. A. 10th), 112 F. (2d) 696 (1940), writ of certiorari denied in 311 U. S. 704, 61 S. Ct. 170, 85 L. Ed. 457, the plaintiffs, residents and citizens of the state of Texas, brought an action to recover damages for personal injury and property damage in a United States District Court in Colorado. The automobile collision occurred in the state of Nevada. The wrongdoer, a resident and citizen of Colorado, died subsequent to the accident. The action was against the administratrix of his estate.

Under Nevada law, a cause of action for personal injury is not abated by the reason of the death of the wrongdoer but survives against his representatives. The Colorado law did not so provide.

The Circuit Court of Appeals in its decision, on pages 699 and 700 of the report, states as follows:

> "We are of the opinion that it (statute) declares the public policy of Colorado to permit the prosecution of certain causes of action against the executor or administrator of the wrongdoer after his death, but to exclude therefrom causes of action for injuries to the person.

"Foreign law will not be enforced in the courts of a state under the doctrine of comity where it is contrary to the public policy of such state.

"A state may deny a remedy in its courts upon a tort arising in another jurisdiction."

The case of *Dougherty vs. Am. McKenna Products Co.*, supra, is cited in footnotes in support of the part above quoted.

Local public policy was allowed, therefore, to control and to exclude maintenance of a cause of action for personal injury, although maintainable under the law of Nevada where the cause of action arose. While the cause of action survived under the Nevada statute, no remedy was granted therefor under the statute of the forum.

In New York, a statute declared the public policy to be that no action for personal injuries caused by a deceased tort feasor shall be brought against his personal representative. It was held that a suit against the personal representative of a deceased wrongdoer could not be maintained in New York for personal injuries resulting from negligence of the decedent even though the injuries were inflicted in New Jersey, where the law is that such an action shall not die with the wrongdoer but shall survive against his personal representative. See 132 *A. L. R.* 470, 471, *Annotation*, citing *Dougherty vs. Gutenstein* (1935; D. C.), 10 F. Supp. 782.

If the *Broderick* decision has the sweeping effect contended for, the relief sought by the respective parties plaintiff in Colorado and in New York in the cases cited could not have been constitutionally denied to them.

The decisions in cases made subsequent to that in the *Broderick* case, therefore, refute the contention that the latter holds that the full faith and credit provision of the Federal Constitution requires practically unlimited extra-territorial recognition of all statutes.

Wisconsin may, therefore, withhold jurisdiction from its courts to enforce liability for a wrongful death not caused in Wisconsin as a matter of public policy without violating the full faith and credit clause of the Federal Constitution and without being required to ascribe any justification therefor other than the exercise of an inherent and sovereign power reserved to the states of the nation.

Whatever the purpose of the Wisconsin legislature may have been in confining the jurisdiction of its courts to those actions for wrongful death in which the wrongful act, neglect or default causing death occurred in Wisconsin, if it was to give statutory force to the doctrine of *forum non conveniens* then appellant's action is an appropriate one for the application of such doctrine.

> "In all cases in which the doctrine of *forum non conveniens* comes into play, it presupposes at least two forums in which the defendant is amenable to process; the doctrine furnishes criteria for choice between them."
>
> *Gulf Oil Corporation vs. Gilbert,* 330 U. S. 501, 507, 67 S. Ct. 839, 842.

In appellant's case, the defendant-driver, Glenn C. Fetter, was amenable to process in Wisconsin by virtue of his residence therein and in the state of Illinois where the accident occurred by virtue of his appointment, as a non-resident driver, of the Secretary of State of Illinois

as his attorney for the service of process in an action arising out of a motor vehicle accident upon an Illinois highway, as provided by Chapter 95 1/2, Sec. 23, Smith-Hurd, Illinois Annotated Statutes.

Without doubt, a trial of appellant's action in Illinois would be more easy, expeditious and less expensive than in Wisconsin. Medical and hospital records would be readily accessible. Unwilling witnesses would be subject to compulsory process for attendance. The cost of procuring the attendance of willing witnesses would be substantially less. A view of the site of the accident could be had. The answer to questions arising as to the proper interpretation of the applicable Illinois law would be made by a trial judge more familiar with Illinois statutes and decisions than a Wisconsin judge would be.

Gulf Oil Corporation vs. Gilbert, supra, 330 U. S. 508, 67 S. Ct. 843.

Furthermore, a judgment obtained in Illinois would be enforceable in Wisconsin under the holding in *Kenney vs. Supreme Lodge, Loyal Order of Moose*, 252 U. S. 411, 40 S. Ct. 371, 10 *A. L. R.* 716, although the cause of action upon which the judgment would be based would not.

II.

The Decisions Principally Relied Upon by Appellant as Authority for His Argument Are Readily Distinguishable and, Therefore, Inapplicable.

The case of *Broderick vs. Rosner*, supra, is distinguishable from the case at bar. The statutory liability sought

to be enforced in the former was *contractual* in character. In the latter, it is a statutory liability in *tort* that is sought to be enforced.

In the opinion, 294 U. S. 643, 55 S. Ct. 593, it is stated:

> "Here the nature of the cause of action brings it within the scope of the full faith and credit clause. The statutory liability sought to be enforced is contractual in character. The assessment is an incident of incorporation. Thus the subject-matter is peculiarly within the regulatory power of New York, as the State of incorporation. 'So much so', as was said in Converse vs. Hamilton, 224 U. S. 243, 260, 32 S. Ct. 415, 419, 56 L. Ed. 749, 'that no other state properly can be said to have any public policy thereon. * * * * * * In respect to the determination of liability for an assessment, the New Jersey stockholders submitted themselves to the jurisdiction of New York. For 'the act of becoming a member (of a corporation) is something more than a contract, it is entering into a complex and abiding relation, and as marriage looks to domicil, membership looks to and must be governed by the law of the State granting the incorporation.' Modern Woodmen of America vs. Mixer, 267 U. S. 544, 551, 45 S. Ct. 389, 69 L. Ed. 783, 41 A. L. R. 1384."

Most certainly, what is quoted above as bringing the cause of action under consideration within the scope of the full faith and credit clause is inapplicable to appellant's cause of action based on a wrongful death statute.

The case of *Pink vs. A.A.A. Highway-Express, Inc.*, 314 U. S. 201, 62 S. Ct. 241, concerns the liability of an alleged member of an insolvent mutual insurance company

residing in Georgia for an assessment made in conformity with the statutes of New York, the state of its organization.

In *Magnolia Petroleum Co. vs. Hunt,* 320 U. S. 430, 64 S. Ct. 208, it was held that a compensation award that has become final is entitled to the same faith and credit as a judgment of a court.

In *Milwaukee County vs. M. E. White Co.,* 296 U. S. 268, 56 S. Ct. 229, a suit was involved in a United States District Court of Illinois to recover on a money judgment obtained in Wisconsin.

The question involved in *Williams vs. State of North Carolina,* 317 U. S. 287, 63 S. Ct. 207, concerned the extent to which a judgment of divorce granted in Nevada was entitled to full faith and credit in North Carolina.

The last three cases above referred to, therefore, involve the question of the full faith and credit to be given to a *judgment* in a state other than the one in which it was rendered. Appellant's case here involves not a *judgment* but an *unlitigated cause of action.* Justification for the holdings in the cases involving a judgment can be found in the greater amount of faith and credit that has been accorded to judgments than to unlitigated causes of action. To this effect see *Williams vs. State of North Carolina,* supra, 317 U. S. 211, 63 S. Ct. 211, where it is stated:

> "Thus even though the cause of action could not be entertained in the state of the forum either because it had been barred by the local statute of limitations or contravened local policy, the judgment thereon obtained in a sister state is entitled to full faith and credit.

"A cause of action on a judgment is different from that upon which the judgment was entered. In a suit upon a money judgment for a civil cause of action, the validity of the claim upon which it was founded is not open to inquiry, whatever its genesis."

Milwaukee County vs. M. E. White Co., supra, 296 U. S. 275, 56 S. Ct. 233.

Citation of decisions involving stock assessments or judgments upon litigated causes of action cannot, therefore, serve as authority for determining the issue in appellant's case involving an unlitigated cause of action for wrongful death.

That Congress under authority conferred by the full faith and credit clause of the Constitution, has provided by statute in 1948 for the extra-territorial recognition of statutes as well as judicial proceedings (28 U. S. C., Sec. 1738) does not give any greater weight to an unlitigated cause of action based upon a statute than theretofore existed.

This provision of the Constitution, Art. IV, Sec. 1, and the act in pursuance of it which Congress has passed establishes a rule of evidence rather than of jurisdiction. See quotation from *Anglo-American Provision Co. vs. Davis Provision Co.*, ante, p. 11)

III.

The Alleged National Interest Involved Does Not Outweigh the Local Interest of Wisconsin in the Public Policy Declared by Its Statute Justifying a Disregard of the Latter in Favor of the Former.

Appellant, commencing on page 14 of his brief, points to the present volume of interstate travel by automobile and the number of deaths occurring therein as emphasizing Wisconsin's denial to entertain jurisdiction of an action for a death not caused in Wisconsin. He then states that the frequency of litigation emphasizes the effect of Wisconsin's alleged indifference as against the national interest represented by the full faith and credit clause.

In the first place, any national interest involved is very small. Only two states, Illinois and Wisconsin, limit the jurisdiction of their respective courts by excluding consideration of actions for a death not caused within the state.

In the second place, the situation presented in appellant's case occurs very infrequently if we are to judge from the number of cases reaching the appellate courts. The Wisconsin limitation on jurisdiction has existed since 1857, the year of the enactment of the Wisconsin wrongful death statute. In addition to appellant's action, apparently only two other cases involving the question of the right to maintain an action based on the death statute of another state have reached the Wisconsin Supreme Court in a period of 93 years — *Bain vs. Northern Pacific Railroad Co.*, and *Sheehan vs. Lewis*, cited on page 17 of appellant's brief. In fact, appellant, on page 25 of his brief, admits that "there is a paucity of judicial

authorities directly in point on the subject matter involved."

Assuredly, therefore, no great national interest is involved to outweigh the public policy declared by the Wisconsin death statute with respect to jurisdiction of its courts.

Lastly, Wisconsin will not, as contended, become a haven for those seeking to escape liability in actions of this type. Where a death occurs in another state, the wrongdoer may be sued there because jurisdiction can well nigh universally be obtained over him by reason of his appointment of some state officer as his attorney for the service of process as a condition of his use of the highways of the state as a non-resident driver.

IV.

Wisconsin May Refuse to Enforce a Cause of Action Based Upon the Wrongful Death Statute of Another State as a Matter of Public Policy Without Violating the Due Process Clause of the United States Constitution (Amendments, Art. XIV, Sec. 1).

Wisconsin may deny to its courts the right to entertain jurisdiction of an action for a death not caused therein and based on the statute of another state as a matter of public policy without infringing upon the due process clause of the Federal Constitution.

> "Where this court has required the state of the forum to apply the foreign law under the full faith and credit clause or under the Fourteenth Amend-

ment, it has recognized that a state is not required to enforce a law obnoxious to its public policy. Bradford Electric Co. vs. Clapper, 286 U. S. 145, 160, 161; Hartford Indemnity Co. vs. Delta Co., 292 U. S. 143, 150."

Griffin vs. McCoach, 313 U. S. 498, 507, 61 S. Ct. 1023, 1027.

The result of the decision in appellant's action was to leave his cause of action unaffected because the denial of a remedy to him left "unimpaired the plaintiff's substantive right, so that he is free to enforce it elsewhere."

Bradford Electric Light Co. vs. Clapper, 286 U. S. 145, 160, 52 S. Ct. 571, 576, 82 *A. L. R.* 696;

Dalton vs. Webster, 82 N. C. 279.

Plaintiff's substantive right to sue in Illinois was unaffected by the Wisconsin decision denying to him a remedy in Wisconsin. No violation of the due process clause, therefore, is involved. The view that a right of action given by a foreign death statute is a property right that ought to be protected is subject to the limitation that due process does not require enforcement of such a right when contrary to the public policy of the state of the forum.

No vested right is involved as none can exist in a claim for damages for tort, not connected with or growing out of a contractual relation, until judgment is rendered.

16 *Corpus Juris Secundum, Const'l Law*, Sec. 254, p. 676.

Appellant, in his brief, pages 19 and 20, quotes at length from the opinion in *Loucks vs. Standard Oil Co.*,

a New York decision written by Justice Cardozo as a member of the New York Court of Appeals. What is there said was correct in so far as the statutes there under consideration are concerned.

The New York statute, unlike the Wisconsin wrongful death statute, contained no provision limiting the jurisdiction of its courts to actions for a death caused in New York. It, therefore, has a public policy that is different from that of Wisconsin. To permit the enforcement of the Massachusetts wrongful death statute in the courts of New York violates no public policy of the latter state.

Furthermore, the opinion contains statements that support appellee's position herein. We quote from the report of the decision (120 N. E. 198) as follows:

> "The law of the forum is material only as setting a limit of policy beyond which such obligations will not be enforced there." p. 201.
>
> "Sometimes we refuse to act where all of the parties are non-residents. *Burdick vs. Freeman*, 24 N. E. 949, 120 N. Y. 420." p. 201.
>
> "The sovereign in its discretion may refuse its aid to the foreign right. *St. Louis, I., M. & So. Ry. Co. vs. Taylor*, 210 U. S. 281, 28 S. Ct. 616, 52 L. Ed. 1061; *Dougherty vs. McKenna Process Co.*, 225 Ill. 369, 99 N. E. 619, * * *". p. 202.

Appellant also, in attempting to distinguish the decision in *Chambers vs. Baltimore & Ohio Railroad Co.*, 207 U. S. 142, 28 S. Ct. 34, on page 23 of his brief, cites a footnote to the opinion in *Broderick vs. Rosner*, hereinbefore cited, to the effect that no claim in the *Chambers* case was made under the full faith and credit clause.

However, the language used in the opinion in the *Chambers* decision is broad enough to include any claim that could have been made under the Constitution. We quote from the decision (207 U. S. 151, 28 S. Ct. 36) as follows:

> "She (plaintiff) has not been denied access to the Ohio Courts because she is not a citizen of this state, but because the cause of action she presents is not cognizable in those courts. * * * *We are unable to see that in this case the plaintiff has been refused any right which the Constitution confers upon her* * * *".* (Emphasis inserted)

CONCLUSION.

It is respectfully submitted that Sec. 331.03 of the Wisconsin statutes, as construed by the Wisconsin Supreme Court, declares a valid public policy and that, therefore, it does not violate the United States Constitution, in the manner contended by the appellant, or otherwise. The decision of the Wisconsin Supreme Court, therefore, should be affirmed.

Respectfully submitted,

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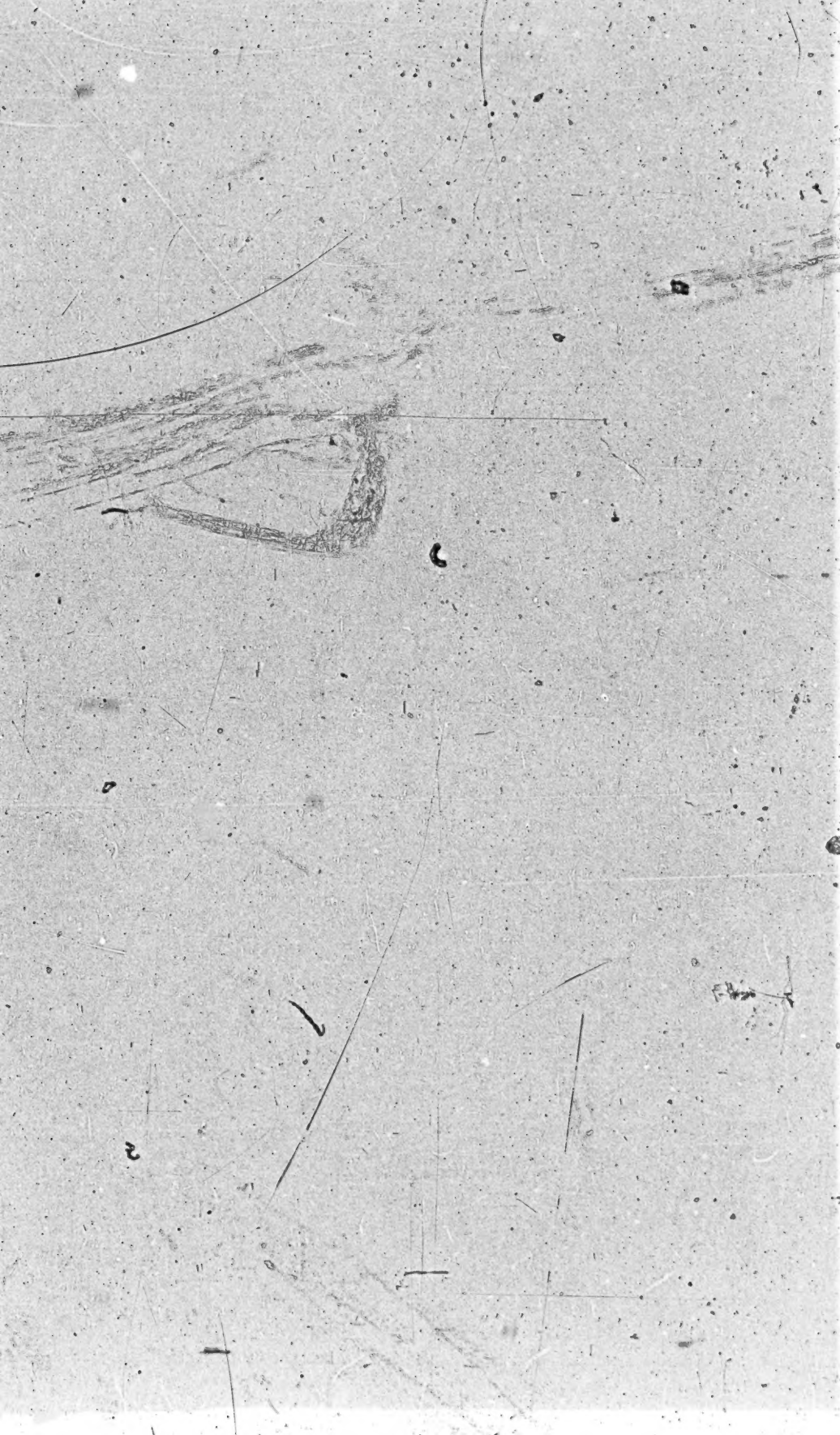

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1950.

No. 355

CORBIN D. HUGHES, ADMINISTRATOR OF THE ESTATE OF HAROLD G. HUGHES,

Plaintiff and Appellant,

vs.

GLENN C. FETTER AND FARMERS MUTUAL AUTOMOBILE INSURANCE COMPANY, A WISCONSIN CORPORATION,

Defendants and Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN.

MOTION OF WILLIAM C. WINES THAT BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI IN FIRST NATIONAL BANK OF CHICAGO, AS EXECUTOR OF THE ESTATE OF JOHN LOUIS NELSON, DECEASED VS. UNITED AIR LINES, INC., A CORPORATION, STAND AND BE CONSIDERED AS BRIEF OF AMICUS CURIAE HEREIN.

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Now comes William C. Wines, of Chicago, Illinois, a member of the bar of this Court, due notice having been given all parties in interest, and moves this Honorable Court that the Brief in support of the Petition for Writ of Certiorari in *First National Bank of Chicago, Executor of the Estate of John Louis Nelson, Deceased* v. *United Air*

Lines, Inc., a Corporation, stand and be considered as the Brief of *Amicus Curiae* herein, and in support of said motion presents Suggestions appended hereto showing why said Motion should be allowed.

WILLIAM C. WINES,
900—160 North La Salle Street,
Chicago, Illinois,
Attorney.

SUGGESTIONS IN SUPPORT OF FOREGOING MOTION.

Nature of Applicant's Interest.

There is filed before this Court a Petition for Writ of Certiorari to the Court of Appeals for the Seventh Circuit, in *First National Bank of Chicago, Executor of the Estate of John Louis Nelson, Deceased* v. *United Air Lines, Inc., a Corporation.* Applicant is attorney for the First National Bank of Chicago, as Executor of the Estate of John Louis Nelson, Deceased, Petitioner therein.

Presented in that case is the same question presented here, namely:

> IS A PROVISION IN A LOCAL WRONGFUL DEATH STATUTE WHICH DIVESTS LOCAL COURTS OF JURISDICTION TO ENTERTAIN SIMILAR ACTIONS CREATED BY LAWS OF SISTER STATES VIOLATIVE OF THE FULL FAITH AND CREDIT CLAUSE, SECTION 1 OF ARTICLE IV OF THE CONSTITUTION OF THE UNITED STATES?

except that in that case the question arises by reason of an application of the principle of *Erie* v. *Tompkins*, 304 U. S. 64, so as to divest the Federal District Court of jurisdiction by reason of the local statute.

Considerations Presented in the First National Bank Case That Are Important To But Not Suggested in This Case.

In the Brief in support of said Petition (pp. 22-28) there is raised the following contention not presented here:

The narrow permissive area in which a State may bar its doors to actions created elsewhere under the full faith

and credit clause is confined to those peculiarly domestic affairs which the several States reserved the right to regulate; and any justifiable policy barring the door to local courts must be expressed by laws regulating such domestic affairs. *Pink* v. *A. A. A. Highway Express*, 314 U. S. 201, 210; *Alaska Packers Ass'n.* v. *Industrial Comm'n.*, 294 U. S. 532, 547.

Illinois (like Wisconsin in the instant case) has expressed her domestic policy in favor of recovery in actions for wrongful death by creating such actions locally and permitting access to her courts for their enforcement. Therefore the statute barring the door of her courts to like actions created elsewhere has no relationship to regulation of her own domestic affairs, and is void under the full faith and credit clause.

Reasons Assigned to Show That the Filing of This Motion Is Timely.

In the *First National Bank of Chicago* case, judgment was entered in the District Court on January 26, 1951. Appeal was perfected to the Court of Appeals for the Seventh Circuit on February 5, 1951. Petition for Writ of Certiorari and the Brief in support thereof are being filed in this Court concurrently with the filing of this Motion. Counsel have worked night and day since January 26, 1951 in perfecting the appeal, preparing the Petition and the Brief in support thereof.

Counsel could not have anticipated the decision of the District Court in that case prior to January 19, 1951, since the case was set for hearing on that date to hear oral argument on the question, among others, of the validity of the local statute under Section 1 of Article IV of the Federal

Constitution, and the trial Court announced its decision on that date.

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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 20

UNITED STATES OF AMERICA, APPELLANT

vs.

STANDARD OIL COMPANY, ET AL.

AVERY, OLIVER M. KNODE, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED MARCH 14, 1950